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8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF NEVADA**
11

12 Joseph O'Shaughnessy, *et al.*,
13 Plaintiffs,
14 v.
15 United States of America, *et al.*,
16 Defendants.
17

No. 2:20-cv-00268-RFB-EJY

**MOTION TO DISMISS FIRST
AMENDED COMPLAINT (DOC. 11)**

18
19 Defendants United States of America, Nadia Ahmed, Steven Myhre, Daniel
20 Bogden, Mark Brunk, Rand Stover, and Joel Willis (hereafter "Defendants"), through
21 counsel, move the Court to dismiss the First Amended Complaint ("FAC")(Doc. 11)
22 pursuant to Rules 12(b)(1) and (6), Fed. R. Civ. P., for the reasons stated herein.¹ This
23 motion is supported by the following Memorandum of Points and Authorities.
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¹ Defendant "Daniel P. Love" is represented by separate counsel.

I. TABLE OF CONTENTS

I.	Table of Contents	i
II.	Table of Authorities.....	ii
III.	Memorandum of Points and Authorities	1
IV.	The First Claim (42 U.S.C. § 1983) Fails To State A Claim And Was Not Filed Within The Applicable Statute Of Limitations.	6
V.	The Individual Defendants are Entitled to Absolute or Qualified Immunity for Claims Asserted Against Them in Their Individual Capacity (the First and Second Claims)	9
VI.	The Second Claim (<i>Bivens</i>) Fails to State a Claim.	21
VII.	The Third Claim (Declaratory Relief) Fails to State a Claim.	36
VIII.	The Fourth Claim (Ftca) Was Filed Prematurely Because Administrative Remedies Were Not Exhausted.....	39
IX.	Conclusion.....	43
X.	Certificate of Service.....	44

II. TABLE OF AUTHORITIES

CASES

Page(s)

<i>Abernathy v. Kingery</i> , 898 F.2d 156 (9th Cir. 1990)	11
<i>Arar v. Ashcroft</i> , 585 F.3d 559 (2d Cir. 2009)	13
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011)	20, 33
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	5-7, 12, 38
<i>Awabdy v. City of Adelanto</i> , 368 F.3d 1062 (9th Cir. 2004)	15-16
<i>Bisson v. Bank of Am., N.A.</i> , 919 F. Supp. 2d 1130 (W.D. Wash. 2013)	36
<i>Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics</i> , 403 U.S. 388 (1971)	2, 24, 27
<i>Botello v. Gammick</i> , 413 F.3d 971 (9th Cir. 2005)	10
<i>Boule v. Egbert</i> , No. 17-106, 2018 U.S. Dist. LEXIS 144583 (W.D. Wash. Aug. 24, 2018)	33
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	15
<i>Briscoe v. LaHue</i> , 460 U.S. 325 (1983)	11
<i>Broom v. Bogan</i> , 320 F.3d 1023 (9th Cir. 2003)	18
<i>Brunoehler v. Tarwater</i> , 743 F. App'x 740 (9th Cir. 2018)	26-27
<i>Buenrostro v. Fajardo</i> , No. 14-75, 2017 U.S. Dist. LEXIS 200002 (E.D. Cal. Dec. 5, 2017)	26
<i>Carlson v. Green</i> , 446 U.S. 14 (1980)	24
<i>Carvajal v. Domniguez</i> , 542 F.3d 561 (7th Cir. 2008)	15
<i>Chandler v. State Farm Mut. Auto Ins. Co.</i> , 598 F.3d 1115 (9th Cir. 2010)	5
<i>Chavez v. Martinez</i> , 538 U.S. 760 (2003)	20
<i>Cnty. House, Inc. v. City of Boise</i> , 623 F.3d 945 (9th Cir. 2010)	12
<i>Collins v. City of Colton</i> , No. 17-55634, 2018 U.S. App. LEXIS 23857 (9th Cir. Aug. 23, 2018)	18
<i>Corr. Servs. Corp. v. Malesko</i> , 534 U.S. 61 (2001)	24
<i>Crawford-El v. Britton</i> , 523 U.S. 574 (1985)	33
<i>Davis v. Passman</i> , 442 U.S. 228 (1979)	24
<i>Deaver v. Seymour</i> , 822 F.2d 66 (D.C. Cir. 1987)	28
<i>Denney v. DEA</i> , 508 F. Supp. 2d 815 (E.D. Cal. 2007)	16
<i>Dietrich v. John Ascuaga's Nugget</i> , 548 F.3d 892 (9th Cir. 2008)	34

1	<i>District of Columbia v. Wesby</i> , 138 S. Ct. 577 (2018)	16-17, 20-21
2	<i>Freeman v. City of Santa Ana</i> , 68 F.3d 1180 (9th Cir. 1995)	16
3	<i>Fry v. Melaragno</i> , 939 F.2d 832 (9th Cir. 1991)	10
4	<i>Genzler v. Longanbach</i> , 410 F.3d 630 (9th Cir. 2005)	11, 15
5	<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975)	29
6	<i>Gibson v. United States</i> , 781 F.2d 1334 (9th Cir. 1986)	26
7	<i>Gonzalez v. Velez</i> , 864 F.3d 45 (1st Cir. 2017)	26
8	<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	20
9	<i>Graham-Sultz v. Clainos</i> , 756 F.3d 724 (9th Cir. 2014)	5, 12
10	<i>Gray v. DOJ</i> , 275 F. App'x. 679 (9th Cir. 2008)	15
11	<i>Grieverson v. Anderson</i> , 538 F.3d 763 (7th Cir. 2008)	13
12	<i>Hanrahan v. Hampton</i> , 446 U.S. 754 (1980)	39
13	<i>Hartman v. Moore</i> , 547 U.S. 250 (2006)	10, 16
14	<i>Haupt v. Dillard</i> , 17 F.3d 285 (9th Cir. 1994)	19
15	<i>Hobbs v. City of Long Beach</i> , 534 F. App'x. 648 (9th Cir. 2013)	18
16	<i>Houser v. United States</i> , 508 F.2d 509 (8th Cir. 1974)	30
17	<i>Ibrahim v. DHS</i> , 538 F.3d 1250 (2008)	7
18	<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976)	10
19	<i>Jerves v. United States</i> , 966 F.2d 517 (9th Cir. 1992)	41
20	<i>Jibreel v. Hock Seng Chin</i> , No. C 13-03470 LB, 2014 WL 12600278 (N.D. Cal. Apr. 17, 2014)	37
21	<i>Johnson v. United States</i> , 704 F.2d 1431 (9th Cir. 1983)	40-41
22	<i>Jones v. Hernandez</i> , No. 16-1986, 2017 U.S. Dist. LEXIS 186300 (S.D. Cal. Nov. 9, 2017)	33-34
23	<i>Krug v. Pellicane</i> , No. 15-55178, 2017 U.S. App. LEXIS 23377 (9th Cir. No. 20, 2017)	26
24	<i>Kwai Fun Wong v. United States</i> , 373 F.3d 952 (9th Cir. 2004)	13
25	<i>League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency</i> , No. 3:09-CV-478-RCJ-RAM, 2013 WL 3463192 (D. Nev. July 9, 2013).....	36
26	<i>Magluta v. Samples</i> , 256 F.3d 1282 (11th Cir. 2001)	13
27	<i>Malley v. Briggs</i> , 475 U.S. 335 (1986)	12
28	<i>Manuel v. City of Joliet</i> , 137 S. Ct. 911 (2017).....	16, 27
	<i>Marcilis v. Twp. of Redford</i> , 693 F.3d 589 (6th Cir. 2012)	13

1	<i>McCarthy v. Mayo</i> , 827 F.2d 1310 (9th Cir. 1987)	10-11
2	<i>McNeil v. United States</i> , 508 U.S. 106 (1993)	41
3	<i>Mirmehdi v. United States</i> , 689 F.3d 975 (2012)	30
4	<i>Morgan v. United States</i> , 60 F. App'x 180 (9th Cir. 2003)	6-7
5	<i>Morse v. N. Coast Opps., Inc.</i> , 118 F.3d 1338 (1997)	6
6	<i>Mullenix v. Luna</i> , 136 S. Ct. 305 (2015)	20
7	<i>Nautilus Ins. Co. v. Access Med., LLC</i> , 780 F. App'x 457 (9th Cir. 2019)	36
8	<i>Newman v. Cty. of Orange</i> , 457 F.3d 991 (9th Cir. 2006)	18
9	<i>Osborn v. United States</i> , 322 F.2d 835 (5th Cir. 1963)	31
10	<i>Patterson v. Van Arsdell</i> , 883 F.3d 826 (9th Cir. 2018)	10
11	<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009)	12
12	<i>Perez v. Seevers</i> , 869 F.2d 425 (9th Cir. 1989)	9, 23
13	<i>Pesnell v. United States</i> , 64 F. App'x 73 (9th Cir. 2003)	41-42
14	<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946)	17
15	<i>Plyler v. United States</i> , 900 F.2d 41 (4th Cir. 1990)	42
16	<i>Rehberg v. Paulk</i> , 566 U.S. 356 (2012)	11
17	<i>Reichle v. Howards</i> , 566 U.S. 658 (2012)	25
18	<i>Robbins v. Oklahoma</i> , 519 F.3d 1242 (10th Cir. 2008)	13
19	<i>S.B. v. County of San Diego</i> , 864 F.3d 1010 (2017)	21
20	<i>Safe Air for Everyone v. Meyer</i> , 373 F.3d 1035 (9th Cir. 2004)	5
21	<i>Sanders v. Brown</i> , 504 F.3d 903 (9th Cir. 2007)	5
22	<i>Shearson v. Holder</i> , 725 F.3d 588 (6th Cir. 2013)	38
23	<i>Skoog v. Cty. of Clackamas</i> , 469 F.3d 1221 (9th Cir. 2006)	16
24	<i>Sloman v. Tadlock</i> , 21 F.3d 1462 (9th Cir. 1994)	18
25	<i>Sparrow v. USPS</i> , 825 F. Supp. 252 (E.D. Cal. 1993)	42
26	<i>Thomas v. Matevousian</i> , No. 17-1592, 2018 U.S. Dist. LEXIS 179459 (E.D. Cal. Oct. 18, 2018)	33
27	<i>Ting v. United States</i> , 927 F.2d 1504 (9th Cir. 1991)	34
28	<i>United States v. Bingham</i> , 653 F.3d 983 (9th Cir. 2011)	18
	<i>United States v. Bundy</i> , 968 F.3d 1019 (9th Cir. 2020)	2
	<i>United States v. Bundy</i> , No. 2:16-CR-46, 2016 WL 3537134 (D. Nev.)	19
	<i>United States v. Bundy</i> , No. 98-cv-531 (D. Nev.)	1

1	<i>United States v. Bundy</i> , No. 12-cv-804 (D. Nev. July 9, 2013)	1
2	<i>United States v. Calandra</i> , 414 U.S. 338 (1974)	29
3	<i>United States v. Caruto</i> , 663 F.3d 394 (9th Cir. 2011)	29
4	<i>United States v. Gaudin</i> , 515 U.S. 506 (1995)	29
5	<i>United States v. Graham</i> , 608 F.3d 164 (4th Cir. 2010)	31
6	<i>United States v. Jim</i> , 865 F.2d 211 (9th Cir. 1989)	16-17
7	<i>United States v. Mechanik</i> , 475 U.S. 66 (1986)	29
8	<i>United States v. Navarro</i> , 608 F.3d 529 (9th Cir. 2010)	18-19
9	<i>United States v. Orleans</i> , 425 U.S. 807 (1976)	39-40
10	<i>United States v. Racing Servs., Inc.</i> , 580 F.3d 710 (8th Cir. 2009)	31
11	<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	30
12	<i>United States v. Scott</i> , 74 F.3d 175 (9th Cir. 1996)	17
13	<i>United States v. Varig Airlines</i> , 467 U.S. 797 (1984)	40
14	<i>United States v. Virginia Erection Corp.</i> , 335 F.2d 868 (4th Cir. 1964)	29
15	<i>United States v. Washington</i> , 106 F.3d 1488 (9th Cir. 1997)	17
16	<i>Vacek v. USPS</i> , 447 F.3d 1248 (9th Cir. 2006)	40, 42
17	<i>Van Strum v. Lawn</i> , 940 F.2d 406 (9th Cir. 1991)	23
18	<i>Vanaman v. Unknown Molinar</i> , No. 17-222, 2018 U.S. Dist. LEXIS 168971 (D. Ariz. Sept. 28, 2018)	33
19	<i>Vega v. United States</i> , 881 F.3d 1146 (2018)	33
20	<i>Vennes v. An Unknown Number of Unidentified Agents</i> , 26 F.3d 1448 (1994)	32-33
21	<i>Wallace v. Kato</i> , 549 U.S. 384–90 (2007)	22-24
22	<i>Warren v. DOI BLM</i> , 724 F.2d 776 (9th Cir. 1984)	40
23	<i>Watson v. United States</i> , No. 16- 608, 2017 U.S. Dist. LEXIS 104853 (D. Nev. July 6, 2017)	42
24	<i>White v. Pauly</i> , 137 S. Ct. 548 (2017)	20
25	<i>Wiens v. U.S. Veterans Hosp.</i> , No. 17-1672, 2017 U.S. Dist. LEXIS 186386 (E.D. Cal. Nov. 7, 2017)	42
26	<i>Wilkie v. Robbins</i> , 551 U.S. 537 (2007)	25, 27, 33
27	<i>Wilson v. Garcia</i> , 471 U.S. 261 (1985)	9
28	<i>Wolfe v. Strankman</i> , 392 F.3d 358 (9th Cir. 2004)	5
	<i>Yorzinski v. Imbert</i> , 39 F. Supp. 3d 218 (D. Conn. 2014)	25

1	<i>Yousefian v. City of Glendale</i> , 779 F.3d 1010 (9th Cir. 2015)	18
2	<i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017)	<i>passim</i>

3 **STATUTES**

4	18 U.S.C. § 922(g)	38
5	18 U.S.C. § 924(c)(iii)(D)(ii)(4)	17
6	18 U.S.C. § 3006A	31
7	18 U.S.C. § 3141-51	30
8	18 U.S.C. § 3142(f)	30
9	18 U.S.C. § 3142(f)(1)	30
10	18 U.S.C. § 3142(f)(2)	30
11	18 U.S.C. § 3142(f)(2)(B)	30
12	20 U.S.C. 1681	39
13	28 U.S.C. § 515	43
14	28 U.S.C. § 1346(b)	39
15	28 U.S.C. § 2073	28
16	28 U.S.C. § 2074	28
17	28 U.S.C. § 2202	36-37
18	28 U.S.C. § 2241	30
19	28 U.S.C. § 2513	31
20	28 U.S.C. § 2513(b)	31
21	28 U.S.C. § 2513(e)	31
22	28 U.S.C. § 2675(a)	40
23	42 U.S.C. § 1681	39
24	42 U.S.C. § 1981(a)	39
25	42 U.S.C. § 1982	39
26	42 U.S.C. § 1983	6, 9, 39
27	42 U.S.C. § 1985	39
28	42 U.S.C. § 1986	39
	42 U.S.C. § 1988	39
	42 U.S.C. § 2000bb	39
	42 U.S.C. § 2000cc	39
	42 U.S.C. § 2000d	39

RULES

Fed. R. App. P. 4(b)	29
Fed. R. App. P. 9	29
Fed. R. Civ. P. 12(b)(1)	1, 5, 39
Fed. R. Civ. P. 12(b)(6)	1, 5, 15
Fed. R. Crim. P. 3, 5.1	29
Fed. R. Crim. P. 5.1(f)	29
Fed. R. Crim. P. 6-7	29
Fed. R. Crim. P. 12	29
Fed. R. Crim. P. 12(b)(3)	29
Fed. R. Crim. P. 23	29
Fed. R. Crim. P. 23-31	29
Fed. R. Crim. P. 26.3	29
Fed. R. Crim. P. 32-39	29
Fed. R. Crim. P. 33	29

REGULATIONS

28 C.F.R. § 25.2	38
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MISCELLANEOUS

143 Cong. Rec. H7786-04 (Sept. 24, 1997)	31
Bureau of Alcohol, Tobacco, Firearms and Explosives “Prohibited Persons List,” https://www.atf.gov/firearms/identify-prohibited-persons	38
Department of Homeland Security’s Traveler Redress Inquiry Program, https://www.dhs.gov/dhs-trip	38
House Rules Committee on Amendment to H.R. 2267, 1997 WL 545756 (Sept. 5, 1997)	31
N.R.S. 11.190(4)(e)	9
Pub. L. No. 105-119, § 617, 111 Stat. 2440 (1997)	31
S. Rep. No. 98-225, at 18 (1983)	30

MEMORANDUM OF POINTS AND AUTHORITIES

III. INTRODUCTION, FACTS, AND STANDARD OF REVIEW

1. INTRODUCTION

This suit arises out of a longstanding dispute between nonparty Cliven Bundy (hereafter, “Bundy”) and the United States. On November 3, 1998, a federal court enjoined Bundy from grazing his cattle on federal land. *United States v. Bundy*, No. 98-cv-531 (D. Nev.) Bundy ignored that order. Fifteen years later, the court again enjoined Bundy from grazing his cattle on federal land, and “ordered that the United States is entitled to seize and remove to impound any of Bundy’s cattle for any future trespasses.” *United States v. Bundy*, No. 12-cv-804 (D. Nev. July 9, 2013) (ECF 35, at 5). In April 2014, as federal officers attempted to seize the cattle, Bundy and hundreds of supporters (including Plaintiffs Dave Bundy, Mel Bundy, O’Shaughnessy and Woods) descended onto the scene. Doc. 11, ¶ 39. The Ninth Circuit Court of Appeals described the events thus,

By April 11, [Bureau of Land Management] BLM had seized approximately 400 animals. FBI agents informed BLM that the gathering militia posed a significant threat to federal officials and private contractors, and advised BLM to cease the operation. The next day, Bundy and his supporters, then estimated to be more than 200 people, assembled to reclaim Bundy’s cattle. Clark County Sheriff Doug Gillespie intervened with Bundy and told the group that BLM had called off the impoundment. Bundy made additional demands, and when they were not met, told the crowd that it was time to “get those cattle.” The crowd then moved to the entrance of the impoundment site, located in a dry-wash bed under an Interstate 15 bridge. Armed supporters took up threatening and tactically advantageous positions, pointing guns at BLM officers. Additional supporters arrived, some on horseback, swelling Bundy’s ranks to more than 400 people. The Bundys demanded that the officers leave. Heavily outnumbered and interested in avoiding bloodshed, federal officials evacuated the impoundment site and left the cattle.

1 *United States v. Bundy*, 968 F.3d 1019, 1024 (9th Cir. 2020).

2 The incident led to federal charges against Bundy and his supporters on various
3 counts relating to assaulting and threatening federal officers. The criminal case was
4 trifurcated for case management purposes, into three tiers. Plaintiffs Dave Bundy, Mel
5 Bundy, O'Shaughnessy and Woods were charged and scheduled to be tried in "Tier 2" of
6 the criminal case. Charges ultimately were dropped against Plaintiffs Dave Bundy, Mel
7 Bundy, O'Shaughnessy and Woods, and they filed this lawsuit. Joining them in this suit
8 are 13 other plaintiffs who are related to either Dave or Mel Bundy. Together, they plead
9 a claim under 42 U.S.C. § 1983, several constitutional damages claims under *Bivens v. Six*
10 *Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a claim
11 for declaratory relief, and a claim under the Federal Tort Claims Act (FTCA). This Court
12 should dismiss all claims against the represented federal defendants. The First Claim
13 (42 U.S.C. § 1983) fails to state a claim and was not filed within the applicable statute of
14 limitations. The Third Claim (declaratory relief) fails to state a claim, and declaratory relief
15 is not available without an underlying judgment. The Fourth Claim (FTCA) was filed
16 prematurely and this Court does not have jurisdiction over the claim.

17 The Second Claim (*Bivens*) also fails to state a claim. The prosecutor defendants
18 are entitled to absolute immunity in their individual capacities. All individual Defendants
19 are entitled to absolute immunity for Grand Jury testimony. Special factors counsel
20 hesitation against creating a new constitutional damages action for wrongful prosecution
21 claims, and the other new contexts alleged by Plaintiffs. And, even if a remedy existed,
22 the individual Defendants are entitled to qualified immunity in their individual capacities
23 because the FAC is devoid of specific allegations tying them to any of the alleged wrongs
24 and because the complaint otherwise fails to sufficiently plead clearly established
25 constitutional violations.

26 For all these reasons, this Court should grant the motion to dismiss.
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1 **2. RELEVANT FACTS ALLEGED IN THE FIRST AMENDED**
 2 **COMPLAINT**

3 Plaintiffs’ 53-page FAC contains a great deal of repetition and conclusory
 4 statements masquerading as facts. Additionally, the FAC repeatedly accuses all individual
 5 defendants of doing every act, or accuses all individual defendants of directing unknown
 6 persons to do acts. For example, the FAC reads, “the GOVERNMENT DEFENDANTS,
 7 and others at their direction and control, later brutally arrested, assaulted, beat and kicked
 8 Plaintiff Dave Bundy, as Defendants Ahmed, Myhre, Bogden, Love, Stover and Brunk,
 9 among others, had planned.” Doc. 11, ¶ 60. This kind of non-specific allegation does not
 10 fairly apprise the individual Defendants of the allegations against them, and does not
 11 comply with pleading standards for *Bivens* cases. See discussion below in Qualified
 12 Immunity section V(3).

13 Below are the actual specific facts alleged in the FAC relevant to the claims asserted
 14 therein, and the issues raised in this motion to dismiss, stripped of their hyperbole and
 15 unsupported conclusions. As done in the FAC, Plaintiffs Dave Bundy, Mel Bundy,
 16 O’Shaughnessy and Woods will be referred to as the Tier 2 Plaintiffs.

17 1. In November 2017, BLM Special Agent Wooten authored a “whistleblower”
 18 memorandum that accused Defendant Love, who, according to Plaintiffs, served as the
 19 Special Agent in Charge of the BLM’s Gold Butte Cattle Impoundment Operation in April
 20 2014, of numerous investigative improprieties and of covering up exculpatory evidence.
 21 Doc. 11, ¶¶ 33, 133.

22 2. On March 27, 2014 a BLM agent wrote an email complaining that, “it appears
 23 the NV USA is directing tactical decisions, something I’ve never seen in 19 years of law
 24 enforcement.... [I]’m in a unique situation in which I must work with a prosecution agency
 25 that is attempt[ing] to direct my enforcement efforts.” Doc. 11, ¶¶ 46.

26 3. Defendant BLM Agent Brunk reported that he acted as a spotter for a BLM
 27 sniper. Defendant FBI Special Agent Willis “corrected” that testimony by having Agent
 28 Brunk clarify that he never acted as or said he acted in such a role, and Defendants AUSAs

1 Bogden, Myhre, and Ahmed (the “defendant prosecutors”) informed the Grand Jury that
2 there were no BLM snipers. Doc. 11, ¶¶ 51, 52.

3 4. The “defendants” directed unnamed agents to obtain videographic evidence and
4 testimony from Bundy supporters prior to and during the stand-off through covert means,
5 then defendant prosecutors used it during the prosecution phase in a misleading manner.
6 Doc. 11, ¶¶ 54-56, 69-74.

7 5. Nevada authorities ordered the individual defendants² to wind-down their
8 operation and release the Bundy cattle. The April 12, 2014 stand-off ended when Agents
9 Bogden and Love arranged for a Bundy family member to release the cattle. The defendant
10 prosecutors then misled the Grand Jury when Prosecutor Bogden questioned and Love
11 testified to the Grand Jury that the Bundy family released the cattle without Agent Love’s
12 authority. Doc. 11, ¶¶ 66-68, 75.

13 6. Prosecutor Myhre questioned and Agent Willis falsely testified to the Grand Jury
14 that Dave Bundy was in a restricted area when he was arrested. Doc. 11, ¶¶ 77-82.

15 7. Prosecutor Ahmed questioned and Agent Stover falsely testified to the Grand
16 Jury that Mel Bundy was arrested because he threatened BLM officers; that the threat
17 assessment said the Bundys would react violently; that the BLM did not employ snipers;
18 and that the “First Amendment Zones” were close to the BLM’s operations. Doc. 11, ¶¶
19 83-91.

20 8. Prosecutors Ahmed, Myhre, Bogden and Agent Willis withheld exculpatory
21 evidence to obtain an indictment and arrest warrants. On March 3, 2016, the Tier 2
22 Plaintiffs were arrested. Thereafter, Defendants withheld evidence from Plaintiffs. Doc.
23 11, ¶¶ 92-95, 98.

24 9. Prosecutors Ahmed, Myhre and Bogden had no probable cause to arrest, and
25 made false allegations against the Tier 2 Plaintiffs in the indictment. Doc. 11, ¶¶ 103-119.

26
27
28 ² The individual Defendants, defined in the FAC as the “GOVERNMENT
DEFENDANTS” include Ahmed, Myhre, Bogden, Willis, Love, Stover and Brunk.

10. Prosecutors Ahmed, Myhre and Bogden concealed evidence and made false and misleading statements about the Tier 2 Plaintiffs during the course of their prosecution. Doc. 11, ¶¶ 120-125.

11. During the criminal trial of non-party Tier 1 defendants, Judge Navarro found that the prosecution committed *Brady* violations and withheld exculpatory evidence. She dismissed the case against the non-party Tier 1 defendants with prejudice. Doc. 11, ¶¶ 136.

12. On February 7, 2018 all charges were dismissed against the Tier 2 Plaintiffs with prejudice, and they were released after 23 months in custody. Doc. 11, ¶¶ 137.

3. STANDARD OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides that a party may move to dismiss a complaint that “lack[s] . . . subject-matter jurisdiction.” A Rule 12(b)(1) attack on subject matter jurisdiction “may be facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted). In a facial challenge, the movant argues that the allegations asserted in the complaint are “insufficient on their face to invoke federal jurisdiction.” *Id.* The court accepts the allegations as true and draws all reasonable inferences in the plaintiff’s favor. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). “The party asserting federal subject matter jurisdiction bears the burden of proving its existence.” *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) (citation omitted).

“To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Graham-Sultz v. Clainos*, 756 F.3d 724, 748 (9th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). When ruling on a motion to dismiss, courts “take all of the factual allegations in the complaint as true, [they] are not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* (citation omitted). “Conclusory allegations and unreasonable inferences . . . are insufficient to defeat a motion to dismiss.” *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). Finally, “[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor

1 does a complaint suffice if it tenders naked assertion[s] devoid of further factual
2 enhancement.” *Iqbal*, 556 U.S. at 678 (internal quotations and citation omitted).

3 **IV. THE FIRST CLAIM (42 U.S.C. § 1983) FAILS TO STATE A CLAIM AND**
4 **WAS NOT FILED WITHIN THE APPLICABLE STATUTE OF**
5 **LIMITATIONS.**

6 **1. The First Claim Fails to State a Claim Upon Which Relief May be**
7 **Granted.**

8 For their First Claim, Plaintiffs alleged that Ahmed, Myhre, Bogden, Willis, Stover,
9 and Brunk (hereafter, “individual Defendants”) acted under color of *Nevada state law* to
10 deprive Plaintiffs of their Constitutional rights, and listed a litany of Constitutional sections
11 and Amendments allegedly violated. Doc. 11, ¶ 144. Plaintiffs correctly stated the legal
12 standard for pursuing a claim under 42 U.S.C. § 1983 as, “a plaintiff must allege two
13 essential elements: (1) violation of a right secured by the Constitution or laws of the United
14 States, and (2) that the alleged deprivation was committed by a person acting under the
15 color of state law.” *Id.*, ¶ 143 (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).³

16 Starting with element (2), it is axiomatic that all the individual Defendants were
17 employees of the United States Government, not the State of Nevada, and they acted in the
18 course and scope of their employment. Doc. 11, ¶¶ 16, 17, 18, 19, 21, 22. Plaintiffs’
19 allegation of individual capacity acts by the individual Defendants concerns either federal
20 prosecution or acts during the cattle impound operation by federal agencies. *See* Doc. 1,
21 ¶¶ 43-64. These were acts in furtherance of the individual Defendants’ employment with
22 the United States Departments of Justice and Interior. None of these acts could fairly be
23 considered conduct on behalf of the State of Nevada, let alone conduct sufficient to create
24 Section 1983 liability. *Morgan v. United States*, 60 F. App’x 180, 181 (9th Cir. 2003)
25 (district court correctly dismissed Section 1983 claim because federal officers “initiated

26 ³ To the extent Plaintiffs may be arguing that these individual defendants could be
27 liable under 42 U.S.C. § 1983 for their actions as Federal employees, they cannot. The
28 Ninth Circuit has stated: “Lest there be any continuing confusion, we take this opportunity
to remind the Bar that by its very terms, § 1983 precludes liability in federal government
actors.” *Morse v. N. Coast Opps., Inc.*, 118 F.3d 1338, 1343 (1997).

1 the law enforcement activities at issue” and state officers were working at their “bequest,”
 2 thus, even “if they were acting jointly, it was under federal law”).

3 Although the Ninth Circuit left open the possibility that federal actors can be subject
 4 to Section 1983 liability if they conspire with state actors, that exception only applies
 5 “where there is a sufficiently close nexus between the State and the challenged action of
 6 the [federal actors] so that the action of the latter may be fairly treated as that of the State
 7 itself.” *Ibrahim v. DHS*, 538 F.3d 1250, 1257 (2008) (citation omitted). Even if that limited
 8 exception applies here, it could only even theoretically do so with respect to the acts alleged
 9 in the FAC to involve Nevada State authorities.

10 The only acts specifically alleged in the FAC to have been done under color of
 11 Nevada State law are contained in FAC ¶¶ 66-68 and 146-148, which alleged Defendants
 12 Bogden and Love “implemented” the “orders” of Nevada authorities “(i.e., the State
 13 action)” to “wind-down their [federal] operation” and for “a Bundy” to open the cattle pen
 14 releasing the cattle. Plaintiffs also alleged that “Defendants Ahmed, Myhre and Bogden”
 15 used the fact that a Bundy opened the pen in their federal prosecution, however, using (or
 16 misusing) evidence in a federal prosecution does not constitute acting under color of
 17 Nevada State law. *Id.*, ¶ 149. Plaintiffs did not allege any acts under color of state law by
 18 any of the Defendants in the First Claim except by Bogden and Love. Therefore, the First
 19 Claim unquestionably fails to state a claim under the *Iqbal* pleading standard as to all
 20 individual Defendants except Bogden and Love and should be dismissed against Ahmed,
 21 Myhre, Willis, Stover, and Brunk for that reason. *Iqbal*, 556 U.S. at 681.⁴

22 The First Claim also fails against Bogden and Love because it does not assert a
 23 claim that is plausible on its face. In spite of the impressive list of Constitutional provisions
 24

25 ⁴ The FAC allegations are not clear about whether the Nevada authorities directed
 26 Bogden and Love to *ensure a Bundy* released the cattle, or just directed them to wind-down
 27 the operation and release the cattle. A reasonable interpretation of Paragraphs 67-68 is that
 28 Bogden and Love decided for their own purposes and for the purpose of federal prosecution
 that a Bundy should release the cattle. If that is what Plaintiffs intended to say, then they
 made no allegation of Nevada state action at all, even against Bogden and Love.

1 in the FAC, the only act alleged under color of state law was when Bogden and Love
2 allegedly wound-down the federal operation, and instructed a member of the Bundy family
3 to release the cattle from the pen. That member of the Bundy family was not one of the
4 Plaintiffs, it was nonparty Margaret Houston. Doc. 11, ¶ 68. There is no plausible
5 inference from Plaintiffs’ FAC allegations that either winding-down the operation or the
6 alleged instruction to Margaret Houston violated Plaintiffs’ Constitutional rights.

7 The entire Section 1983 claim is predicated upon the single act of releasing the
8 cattle, which allegedly was the “catalyst giving rise to the fabricated criminal charges,” and
9 allowed the Department of Justice to “use that affirmative act to establish” their “fabricated
10 theories of criminal conspiracy, extortion, armed robbery, among other false claims.” Doc.
11 11, ¶¶ 147-8. But there is no allegation in the FAC that the act of winding-down the
12 operation and ordering Margaret Houston to release the cattle was itself a violation of
13 Plaintiffs’ Constitutional rights, and for good reason—that would be highly implausible.
14 Plaintiffs’ FAC is really about the “fabricated theories” of criminal conspiracy, etc. that
15 they believe violated their Constitutional rights, not about Margaret Houston being told to
16 release the cattle. Plaintiffs’ true allegation is that Bogden and Love violated their
17 Constitutional rights by misusing the fact that Margaret Houston released the cattle in their
18 federal prosecution of the Tier 2 Plaintiffs, not that their Constitutional rights were violated
19 when Bogden and Love allegedly ordered her to do so. The problem for their Section 1983
20 claim is that the federal prosecution was not conducted under color of Nevada State law.

21 To plead a viable Section 1983 claim, Plaintiffs must allege a violation of a
22 Constitutional right that was committed by a person acting under the color of state law.
23 There is no plausible allegation in the FAC that the single act alleged to be perpetrated
24 under color of state law violated the Constitutional rights of the Plaintiffs. For this reason,
25 the First Claim fails to state a claim against any of the Defendants, including Bogden and
26 Love, and should be dismissed in its entirety.

1 **2. The First Claim Was Not Filed Within the Applicable Statute of**
 2 **Limitations Period.**

3 The First Claim should also be dismissed in its entirety because the two year statute
 4 of limitations to file a lawsuit under 42 U.S.C. § 1983 expired years before the Complaint
 5 was filed. Even assuming for the sake of argument that Bogden and Love’s alleged act of
 6 “implementing” the “orders” of Nevada authorities constituted acting under the color of
 7 state law to violate Plaintiffs’ Constitutional rights, which it does not, that act happened on
 8 April 12, 2014. Doc. 11, ¶ 51. Plaintiffs filed their Complaint on February 6, 2020, five
 9 years, nine months, and 25 days later. Doc. 1. The statute of limitations for section 1983
 10 claims in Nevada is two years. *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989); N.R.S.
 11 11.190(4)(e); *see Wilson v. Garcia*, 471 U.S. 261 (1985).

12 The First Claim should be dismissed because the statute of limitations expired long
 13 before the lawsuit was filed.

14 **V. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO ABSOLUTE OR**
 15 **QUALIFIED IMMUNITY FOR CLAIMS ASSERTED AGAINST THEM IN**
 16 **THEIR INDIVIDUAL CAPACITY (the First and Second Claims).**

17 Of the twelve fact allegations in the FAC itemized above in section III(2) of this
 18 motion, one (# 1) solely involves Defendant Love who is not represented by undersigned
 19 counsel and is not a subject of this motion to dismiss, and one (# 12) is not an allegation of
 20 fault against any defendants. As discussed in this section, eight of the remaining ten fact
 21 allegations involve solely matters protected by absolute immunity for either prosecutorial
 22 conduct or Grand Jury testimony, or both. Only two fact allegations (# 2—as to unnamed
 23 Nevada US Attorneys) and (# 8—as to Willis only) may not be subject to absolute
 24 immunity but they are protected by qualified immunity, and/or the statute of limitations
 25 expired on the claim.⁵

26
27
28 ⁵ See sections IV(2) and VI(2) of this motion for statute of limitations discussion.

1 **1. Defendants Bogden, Myhre, and Ahmed are Entitled to Absolute**
 2 **Prosecutorial Immunity on the First and Second Claims.**

3 Plaintiffs alleged two constitutional claims (First Claim—Section 1983 and Second
 4 Claim—*Bivens*) against Defendants AUSAs Bogden, Myhre, and Ahmed in their
 5 individual capacities, arising out of decisions related to their advocacy functions as federal
 6 prosecutors. It has long been understood that prosecutors enjoy absolute immunity for
 7 damages suits where they act within the scope of their advocacy functions. *See Imbler v.*
 8 *Pachtman*, 424 U.S. 409, 427 (1976). This immunity also applies to U.S. attorneys sued
 9 under *Bivens*. *See Fry v. Melaragno*, 939 F.2d 832, 834, 837 (9th Cir. 1991). Thus,
 10 absolute immunity protects these defendants from civil liability for any decision related to
 11 their advocacy functions as federal prosecutors.

12 Courts generally “take a functional approach when determining whether a given
 13 action is protected by prosecutorial immunity.” *Patterson v. Van Arsdell*, 883 F.3d 826,
 14 829 (9th Cir. 2018). Under that approach, absolute immunity applies to all conduct
 15 “intimately associated with the judicial phase of the criminal process.” *Id.* at 830 (quoting
 16 *Imbler*, 424 U.S. at 430). It is well established that “[a]ctions classified as ‘advocacy’
 17 include initiating a prosecution.” *Id.* (quoting *Imbler*, 424 U.S. at 431). Accordingly, the
 18 Supreme Court and the Ninth Circuit have held that prosecutors are immune from suit for
 19 decisions whether to initiate a criminal prosecution. *See Imbler*, 424 U.S. at 431 (holding
 20 “that in initiating a prosecution and in presenting the [government’s case], the prosecutor
 21 is immune from a civil suit for damages”); *Hartman v. Moore*, 547 U.S. 250, 262-63 (2006)
 22 (“A *Bivens* (or § 1983) action for retaliatory prosecution will not be brought against the
 23 prosecutor, who is absolutely immune from liability for the decision to prosecute.”);
 24 *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005) (“It is well established that a
 25 prosecutor has absolute immunity for the decision to prosecute a particular case.”) (citation
 26 omitted).

27 This immunity applies regardless of intent. *McCarthy v. Mayo*, 827 F.2d 1310, 1315
 28 (9th Cir. 1987) (“The intent of the prosecutor when performing prosecutorial acts plays no

1 role in the immunity inquiry.”). Thus, prosecutors are entitled to absolute immunity even
 2 where it is alleged they “maliciously initiated a prosecution, used perjured testimony at
 3 trial, or suppressed material evidence at trial.” *Genzler v. Longanbach*, 410 F.3d 630, 637
 4 (9th Cir. 2005) (citation omitted). This immunity also applies even if it “leave[s] the
 5 genuinely wronged defendant without civil redress.” *Id.* (citation omitted). Based on the
 6 foregoing, this Court should dismiss the First Claim (Section 1983) and Second Claim
 7 (*Bivens*) against Defendants Bogden, Myhre, and Ahmed in their individual capacities on
 8 the basis of absolute immunity.

9 **2. The Individual Defendants are Entitled to Absolute Immunity as to All**
 10 **Claims Based on Grand Jury Testimony.**

11 Plaintiffs asserted Section 1983 and *Bivens* claims based on allegedly fabricated and
 12 perjured Grand Jury testimony. Doc. 11, ¶¶ 50-52, 56, 73-92, 113, 180A, 180C. On this
 13 claim, the individual Defendants are entitled to absolute immunity. *Briscoe v. LaHue*, 460
 14 U.S. 325, 345 (1983) (witness who testifies at trial enjoys absolute immunity from any
 15 § 1983 claim based on his testimony); *Rehberg v. Paulk*, 566 U.S. 356, 367-69 (2012)
 16 (holding that grand jury witnesses enjoy the same immunity as witnesses at trial; immunity
 17 applies to lay and law enforcement witnesses alike); *see also Abernathy v. Kingery*, 898
 18 F.2d 156 (9th Cir. 1990) (applying *Briscoe* to *Bivens* context; affirming dismissal of *Bivens*
 19 claim, holding that “[e]ven if the defendants gave perjured testimony before the grand jury,
 20 they are absolutely immune from damages for their testimony”).

21 Moreover, this immunity extends to any allegations that the individual Defendants
 22 conspired with other Defendants to present false testimony to the grand jury. *See Rehberg*,
 23 566 U.S. at 369 (holding that the rule of affording absolute immunity to grand jury
 24 witnesses “may not be circumvented by claiming that a grand jury witness conspired to
 25 present false testimony or by using evidence of the witness’ testimony to support any other
 26 §1983 claim concerning the initiation or maintenance of a prosecution.”) Plaintiffs’ claims
 27 against the individual Defendants that are premised on allegations of allegedly fabricated
 28 and perjured Grand Jury testimony must be dismissed.

1 **3. Plaintiffs Fail to State A Claim Because the FAC Fails to Sufficiently**
 2 **Allege Personal Participation by the Individual Defendants, and**
 3 **Defendants Are Entitled to Qualified Immunity Because the FAC Failed**
 4 **to Allege a Clearly Established Constitutional Violation.**

5 “To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain
 6 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its
 7 face.” *Graham-Sultz v. Clainos*, 756 F.3d 724, 748 (9th Cir. 2014) (quoting *Ashcroft v.*
 8 *Iqbal*, 556 U.S. 662, 678 (2009)). Even if a plaintiff has stated a claim, a government
 9 official sued in his individual capacity is entitled to qualified immunity, and thus protected
 10 from liability for civil damages, “insofar as their conduct does not violate clearly
 11 established statutory or constitutional rights of which a reasonable person would have
 12 known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotations and citation
 13 omitted). This protection is “ample.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It
 14 shields “all but the plainly incompetent or those who knowingly violate the law,” *id.*, and
 15 applies “regardless of whether the government official’s error is a mistake of law, a mistake
 16 of fact, or a mistake based on mixed questions of law and fact.” *Pearson*, 555 U.S. at 231
 (internal quotations omitted).

17 In addressing qualified immunity, courts answer two questions: first, whether the
 18 facts alleged show that the defendant violated a constitutional right, and second, whether
 19 that right was clearly established at the time. *Cnty. House, Inc. v. City of Boise*, 623 F.3d
 20 945, 967 (9th Cir. 2010). Courts can decide which question to answer first. *Pearson*, 555
 21 U.S. at 236. If the facts alleged do not show conduct that violated a constitutional right, or
 22 if that right was not clearly established at the time of the events alleged, the defendant is
 23 immune from suit. *Id.* at 243-45.

24 Finally, in both *Bivens* and Section 1983 suits, there is no such thing as “vicarious
 25 liability.” *Iqbal*, 556 U.S. at 676. Thus, absent factual allegations plausibly suggesting
 26 each defendant’s *direct involvement* in a constitutional violation, that defendant must be
 27 dismissed from the suit. *Id.* In this regard, blanket allegations that reference “Defendants”
 28 collectively are insufficient to give defendants fair notice of the claims against them.

Courts routinely reject such allegations as insufficient. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 966 (9th Cir. 2004) (dismissing *Bivens* claim that “fail[ed] to identify what role, if any, each individual defendant had in” the alleged violation).⁶

a. *The FAC Fails to Sufficiently Allege Personal Participation.*

Plaintiffs made the wholly conclusory and non-specific allegation that, “the GOVERNMENT DEFENDANTS’ individual-capacity conduct was purposefully directed with a discriminatory purpose against [Plaintiffs] based upon their religious beliefs and status as ‘Mormons,’ and in express contravention of their equal protection and freedom of expression rights.” Doc. 11, ¶ 156. This conclusory allegation does not appear to be supported by any actual factual allegations in the FAC, and it is insufficient to state a claim against any of the Defendants.⁷

The only other allegation of religious bias was that “throughout their incarceration, prison guards, at the direction of the GOVERNMENT DEFENDANTS, interfered with and ridiculed the Tier 2 Plaintiffs’ LDS garments.” Doc. 11, ¶ 139G. This blanket allegation, which asserts wrongdoing on behalf of non-parties, doesn’t even allege personal participation in an alleged Constitutional violation by any of the Defendants, and is also insufficient to state a claim.

On the prosecution-based claims, the complaint contains no specific allegation that Defendants Brunk, Stover, and Willis were responsible for the decision to prosecute Plaintiffs, stating only that they, along with all the other Defendants “obtained an indictment against the Tier 2 Plaintiffs.” Doc. 11, ¶ 92. A blanket allegation like this is

⁶ *See also Marcilis v. Twp. of Redford*, 693 F.3d 589, 596-97 (6th Cir. 2012) (categorical references to all defendants without specifying what each did is improper); *Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009) (en banc) (same); *Robbins v. Oklahoma*, 519 F.3d 1242, 1249-50 (10th Cir. 2008) (same); *Grieverson v. Anderson*, 538 F.3d 763, 778 (7th Cir. 2008) (same); *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (rejecting allegation that defendants engaged in misconduct “with no distinction among the fourteen defendants charged”).

⁷ There is a bald allegation that Defendant Stover exhibited “extreme Anti-Mormon bias and religious hatred against the Bundy family.” Doc. 11, ¶ 156. This allegation is wholly unsupported by any factual reference in the FAC.

1 insufficient to state a claim against any one defendant.

2 The FAC makes virtually no allegations of constitutional violations solely
3 perpetrated by BLM Special Agent Brunk. With only one exception, he is either included
4 in the nonspecific moniker “Government Defendants,” or in every paragraph of the FAC
5 his name actually appears, lumped into a group of individual Defendants and other
6 unnamed persons without specificity as to what he personally is alleged to have done. *See*
7 Doc. 11, ¶¶ 36, 48-50, 58-61, 76, 92, 98, 114, 139. Furthermore, with only one exception,
8 every allegation against Brunk contained in those FAC paragraphs is conclusory. The
9 single exception—apparently the only actual piece of factual evidence Plaintiffs have
10 involving Brunk—is his testimony to the Grand Jury. Doc. 11, ¶¶ 51-52. Defendant
11 Brunk has absolute immunity for his Grand Jury testimony as explained in Section V(2).

12 Likewise, there are few specific allegations against BLM Special Agent Stover.
13 *See* Doc. 11, ¶¶ 36, 48-50, 58-61, 76, 92, 98, 114, 139.⁸ The exceptions are the allegation
14 that Stover and Love determined that “excessive” tactics were required, *id.* ¶¶ 37, 57; they
15 staged a videotaped confrontation with the Bundy supporters, *id.* ¶¶ 54-55; and that Stover
16 testified falsely to the Grand Jury, *id.* ¶¶ 84-86, 89-91. The acts alleged in concert with
17 Love during the planning and execution of the Cattle Impoundment operation were not
18 actually alleged to have violated the Plaintiffs’ civil rights, and indeed didn’t violate their
19 rights in a manner that could possibly give rise to a *Bivens* remedy. And, Defendant Stover
20 has absolute immunity for his Grand Jury testimony as explained in Section V(2) of this
21 motion above.

22 Defendant Willis is treated similarly. He is lumped together with the other
23 defendants and unnamed non-parties without specificity several times. *See* Doc. 11, ¶¶
24 48, 50, 76, 92, 98. The exceptions are for Grand Jury testimony for which Willis has
25 absolute immunity, *id.* ¶¶ 51-52, 77-83; videotaping the Bundy supporters, *id.* ¶¶ 69-72;
26 and about withholding exculpatory evidence.

27 The FAC does allege that Defendant Willis was aware that exculpatory evidence
28

⁸ Note that these are the exact same paragraphs in which Brunk’s name appears.

1 was withheld from the Grand Jury and others during prosecution. But this could not give
 2 rise to liability against Defendant Willis (or Brunk or Stover) because the FAC in every
 3 instance also alleges in the same breath that the prosecutors were aware of this alleged
 4 exculpatory evidence. *See* Doc. 11, ¶¶ 92-94, 98, 111-114. It is well settled that officers
 5 discharge their duties under *Brady v. Maryland*, 373 U.S. 83 (1963), when they share
 6 exculpatory evidence with the prosecutor. *See Gray v. DOJ*, 275 F. App'x. 679, 681 (9th
 7 Cir. 2008) (“We have since clarified the application of *Brady* to law enforcement officers,
 8 holding that once the officer turns the evidence over to the prosecutor, her duty is complete
 9 and due process satisfied.”) (citation omitted); *Carvajal v. Domniguez*, 542 F.3d 561, 568
 10 (7th Cir. 2008) (where the prosecutor and officer both know of *Brady* material and fail to
 11 disclose it, “it could not logically support a cause of action against [the officer], rather
 12 than the prosecutor.”) It is also well settled that prosecutors are absolutely immune for
 13 any decision whether to disclose *Brady* material. *See Genzler*, 410 F.3d at 637.

14 In sum, absent factual allegations plausibly suggesting their direct involvement in
 15 the alleged constitutional violations, Plaintiffs have failed to state a claim, and their
 16 allegations should be dismissed under Rule 12(b)(6). In addition, because Plaintiffs have
 17 failed to state a claim, they have not alleged a violation of clearly established statutory or
 18 constitutional right, and the individual Defendants are entitled to qualified immunity.

19 **b. *This Court Should Dismiss the Second Claim for Failing to State a***
 20 ***Claim for Wrongful Prosecution and Grant Defendants Qualified***
 21 ***Immunity Based on Plaintiffs’ Failure to Allege a Clearly***
 22 ***Established Constitutional Violation.***

23 Independent of the *Abbasi* question (see *infra* VI(C)), and the personal participation
 24 deficiencies, the FAC also fails to sufficiently plead wrongful prosecution-based *Bivens*
 25 claims. To state a malicious prosecution claim, a plaintiff must plead “that the defendants
 26 prosecuted [him] with malice and without probable cause, and that they did so for the
 27 purpose of denying [him] equal protection or another specific constitutional right.”
 28 *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004) (citation omitted).
 Where the initiation of prosecution causes one to be detained, the Fourth Amendment is

1 implicated, *see Manuel*, 137 S. Ct. at 914-15; and where the but-for cause of the
 2 prosecution is to chill or silence speech, the First Amendment is implicated. *See Skoog v.*
 3 *Cty. of Clackamas*, 469 F.3d 1221, 1231-32 (9th Cir. 2006); *Denney v. DEA*, 508 F. Supp.
 4 2d 815, 830-31 (E.D. Cal. 2007) (“Although previous Ninth Circuit law suggested that
 5 plaintiffs need only prove that the retaliatory animus was a ‘substantial or motivating
 6 factor,’ it appears that *Hartman* has elevated the requisite standard to but-for causation.”).

7 In all events, the plaintiff must sufficiently plead as an element of the claim a lack
 8 of probable cause. *See Moore*, 547 U.S. at 265-66; *Awabdy*, 368 F.3d 1062, 1066 (9th
 9 Cir. 2004).

10 The Supreme Court recently summarized the probable cause standard:

11 To determine whether an officer had probable cause for an arrest, we
 12 examine the events leading up to the arrest, and then decide whether these
 13 historical facts, viewed from the standpoint of an objectively reasonable
 14 police officer, amount to probable cause. Because probable cause deals with
 15 probabilities and depends on the totality of the circumstances, it is a fluid
 16 concept that is not readily, or even usefully, reduced to a neat set of legal
 rules. It requires only a probability or substantial chance of criminal activity,
 not an actual showing of such activity. Probable cause is not a high bar.

17 *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (internal quotations and
 18 citations omitted). Even where probable cause is lacking, an officer is entitled to qualified
 19 immunity if he “reasonably but mistakenly conclude[d] that probable cause [wa]s
 20 present.” *Id.* at 591 (citation omitted). “[T]he mere fact a prosecution was unsuccessful
 21 does not mean it was not supported by probable cause.” *Freeman v. City of Santa Ana*,
 22 68 F.3d 1180, 1189 (9th Cir. 1995).

23 The Tier 2 Plaintiffs were charged with conspiracy to threaten, assault, and impede
 24 a federal officer, use of a firearm during a crime of violence, and aiding and abetting. *See*
 25 Doc. 11 ¶ 41. Assault on a federal officer is a general intent crime; the defendant’s state
 26 of mind is thus irrelevant. *United States v. Jim*, 865 F.2d 211, 212-13 (9th Cir. 1989)
 27 (citation omitted). “The only issue would be whether a reasonable man would find that
 28 the defendant’s actions should have put a federal officer in apprehension of bodily harm.”

1 *Id.* (citation omitted). To be held liable for using a firearm during a crime of violence, the
2 person need only have “brandished” the firearm, which is statutorily defined to mean to
3 “display all or part of the firearm, or otherwise make the presence of the firearm known
4 to another person, in order to intimidate that person, regardless of whether the firearm is
5 directly visible to that person.” 18 U.S.C. § 924(c)(iii)(D)(ii)(4). Thus, the firearm need
6 not be pointed directly at the victim for criminal liability to attach. *Id.*; *United States v.*
7 *Scott*, 74 F.3d 175, 178 (9th Cir. 1996) (simply holding firearm in hand sufficient
8 brandishing).

9 Finally, these charges were pled along with conspiracy and aiding and abetting
10 allegations, meaning that the Tier 2 Plaintiffs need not have actually committed the
11 substantive offenses themselves for criminal liability to attach. *See Pinkerton v. United*
12 *States*, 328 U.S. 640, 646-48 (1946) (explaining elements of criminal conspiracy); *see also*
13 *United States v. Washington*, 106 F.3d 1488, 1490 (9th Cir. 1997) (defendant held liable
14 for use of firearm where only co-conspirator displayed weapon).

15 In short, as long as an objectively reasonable person could have believed that any
16 one of the armed Bundy supporters were there to impede law enforcement or place a
17 reasonable officer in apprehension of bodily harm and Plaintiffs provided some assistance,
18 probable cause existed to initiate proceedings against them – even if Plaintiffs themselves
19 did not point a weapon or assault, threaten, or impede a federal officer. Qualified
20 immunity also allows for reasonable mistakes. *See Wesby*, 138 S. Ct. at 591. Thus, unless
21 *every reasonable officer* would have found no probable cause on the facts alleged,
22 qualified immunity applies. *Id.* at 589.

23 Here, the Bundy supporters, including Plaintiffs, descended onto the scene heavily
24 armed to protest the legally authorized cattle impoundment operation. The FAC described
25 the situation as a “powder-keg” that was “escalating out of control” until the federal
26 officers were convinced to leave. Doc. 11, ¶¶ 65-66. That is more than sufficient for this
27 Court to find that probable cause existed to charge Plaintiffs for their admitted
28 participation in the standoff. Plaintiffs allege they were only there to “protest,” but their

1 intent is irrelevant. As long as their conduct would place a reasonable officer in
 2 apprehension of bodily harm, probable cause existed to charge them. Plaintiffs allege they
 3 only acted in self-defense. But it is well settled that the existence of some evidence
 4 suggesting self-defense is an issue for the criminal trier of fact; it does not negate probable
 5 cause for the initiation of proceedings. *See Yousefian v. City of Glendale*, 779 F.3d 1010,
 6 1014 (9th Cir. 2015) (“[The] claim of self-defense apparently created doubt in the minds
 7 of the jurors, but probable cause can well exist (and often does) even though ultimately, a
 8 jury is not persuaded that there is proof beyond a reasonable doubt.”). That is because
 9 once probable cause exists, the Constitution does not require officers to investigate every
 10 claim of innocence. *See Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003).

11 Based on the foregoing, the FAC’s allegations alone are sufficient for this Court to
 12 find that probable cause existed to initiate proceedings. But even if not, it is well settled
 13 that a grand jury indictment creates a presumption of probable cause. *Hobbs v. City of*
 14 *Long Beach*, 534 F. App’x. 648, 649 (9th Cir. 2013). The presumption can only be
 15 overcome by specific allegations that the indictment was “induced by fraud, corruption,
 16 perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith.” *Id.* at
 17 649-50 (quoting *Awabdy*, 368 F.3d at 1067). “[A] plaintiff’s account of the incident in
 18 question, by itself, does not overcome the presumption of independent judgment.” *Sloman*
 19 *v. Tadlock*, 21 F.3d 1462, 1474 (9th Cir. 1994); *see also Newman v. Cty. of Orange*, 457
 20 F.3d 991, 995 (9th Cir. 2006). Inconsistencies in the evidence are also insufficient;
 21 instead, a plaintiff must identify knowingly false or fabricated facts that caused the
 22 indictment to issue. *See Collins v. City of Colton*, No. 17-55634, 2018 U.S. App. LEXIS
 23 23857, *4 (9th Cir. Aug. 23, 2018). Notably, the withholding of exculpatory evidence
 24 from the grand jury does not generally overcome the presumption of probable cause
 25 because there is no duty to present exculpatory evidence to a grand jury. *United States v.*
 26 *Bingham*, 653 F.3d 983, 999 (9th Cir. 2011) (“[T]he government has no obligation to
 27 disclose ‘substantial exculpatory evidence’ to a grand jury.”); *United States v. Navarro*,
 28 608 F.3d 529, 537 (9th Cir. 2010) (“[We] have held that prosecutors have no obligation

1 to disclose ‘substantial exculpatory evidence’ to a grand jury.”). Instead, exculpatory
2 evidence only becomes relevant for purposes of the probable-cause presumption where it
3 completely “obviate[s] probable cause.” *See Haupt v. Dillard*, 17 F.3d 285, 290 n.5 (9th
4 Cir. 1994).

5 Here, a grand jury indicted the Tier 2 Plaintiffs creating a presumption of probable
6 cause for their arrest. Throughout the criminal process, the district court rejected multiple
7 challenges to the indictment and to the continued detention of Bundy’s supporters, and
8 denied several motions to acquit, finding that “a rational trier of fact could find [them]
9 guilty of the crimes charged.” *United States v. Bundy*, No. 2:16-cr-46 (ECF 2055, at 3).
10 Courts require something more to overcome the presumption of probable cause: either an
11 allegation *with sufficient supporting factual content* that (1) the indictment was induced
12 by knowingly false or fabricated evidence or (2) knowingly withheld exculpatory evidence
13 would have completely obviated the grand jury’s probable cause finding.

14 Plaintiffs use the word “fabricated” repeatedly in the FAC as a conclusory
15 accusation against Defendants. A perusal of the factual allegations, however, reveals there
16 are only a handful of specific allegations of fabrication as described in Section III(2)
17 above. Even assuming the truth of these allegations, the Tier 2 Plaintiffs’ admitted
18 participation in the Bunkerville standoff alone, as described by the Ninth Circuit in Section
19 III(1) above, is sufficient to establish probable cause. It is difficult to see how Plaintiffs’
20 few and relatively insignificant allegations of fabrication, had any effect considering the
21 overwhelming evidence supporting probable cause. A brief review of the criminal
22 indictment of Bundy confirms this. *See United States v. Bundy*, No. 2:16-CR-46, 2016
23 WL 3537134 (D. Nev.)

24 The existence of probable cause should not be in doubt. But even if it is, Plaintiffs
25 failed to allege specific facts sufficient to overcome the presumption of probable cause
26 created by the grand jury indictment, and their claim should be dismissed on these grounds.
27 In addition, because there was probable cause, Plaintiffs have failed to allege a violation of
28 a clearly established constitutional right, the individual Defendants are entitled to qualified

immunity against a malicious prosecution claim.

c. *This Court Should Dismiss the Second Claim Against the Individual Defendants for Failing to State a Claim of Excessive Force and Grant Defendants Qualified Immunity Based on Plaintiffs’ Failure to Allege a Clearly Established Constitutional Violation.*

Although unclear, the FAC could also be construed to allege that Defendants used excessive force, which would be governed by the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989); *Chavez v. Martinez*, 538 U.S. 760, 773 n.5 (2003). Plaintiffs alleged excessive “tactics” or excessive force a few times in the FAC, as a general reference to the whole operation or to the use of snipers. Doc. 11, ¶¶ 37, 53, 60, 99-100, 133K, 133Q. With the exception of the allegation in paragraph 60 about Dave Bundy’s arrest, the allegations of excessive force are conclusory and directed at the Defendants generally. Also, apart from paragraph 60, Plaintiffs do not specify any particular use of force against them directly. And, in paragraph 60, Plaintiffs do not allege the active participation of any of the individual Defendants. *Id.*, ¶ 60 (“the GOVERNMENT DEFENDANTS, and others at their direction and control, later brutally arrested, assaulted, beat and kicked Plaintiff Dave Bundy.”) Plaintiffs’ allegations not only fail to state a claim against these specific Defendants, which alone is sufficient to dismiss this claim, but they fail to state a clearly established constitutional violation for excessive force. .

Recently the Supreme Court has underscored “the longstanding principle that clearly established law should not be defined at a high level of generality,” instead, it “must be particularized to the facts of the case.” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curium)(internal quotations and citations omitted).⁹

⁹ “Such specificity is especially important in the Fourth Amendment context because “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curium) (internal quotations and citation omitted). “The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.” *al-Kidd*, 563 U.S. at 742; *see also Wesby*, 138

1 The Ninth Circuit has heeded the Supreme Court’s call. *See S.B. v. County of San*
 2 *Diego*, 864 F.3d 1010, 1016 (2017) (“[W]e must identify a case where an officer acting
 3 under similar circumstances as [the officer here] was held to have violated the Fourth
 4 Amendment.”) This as an “exacting standard.” *Id.* at 1017.

5 Since the FAC does not clearly specify what acts by these Defendants constituted
 6 excessive force against these Plaintiffs, it seems impossible for this Court to find that the
 7 Defendants violated a clearly established constitutional proscription. Absent any case law
 8 clearly establishing that every reasonable official would have understood that the Fourth
 9 Amendment prohibits officers from doing whatever it is Plaintiffs think they alleged the
 10 Defendants were doing that constituted excessive force, the individual Defendants are
 11 entitled to qualified immunity.

12 **VI. THE SECOND CLAIM (*BIVENS*) FAILS TO STATE A CLAIM.**

13 **1. Plaintiffs Failed to State a Valid *Bivens* Claim For Constitutional and** 14 **Statutory Violations.**

15 Plaintiffs threw the Constitution at Defendants, alleging dozens of Constitutional
 16 and statutory violations they believe stated a *Bivens* claim. The question for this Court to
 17 decide is solely whether a *Bivens* remedy exists for each of the alleged Constitutional and
 18 statutory violations. Within the *Bivens* context, notwithstanding the immunities explained
 19 in Section V of this motion, none of Plaintiffs’ alleged violations states a claim. Plaintiffs’
 20 claims appear to be summarized in FAC paragraph 139.

21 The Second Claim purports to assert a *Bivens* claim against the individual
 22 Defendants for alleged violations of Plaintiffs First, Second, Fourth, Fifth and Eighth
 23 Amendment rights. Several grounds exist for dismissing these claims. Specifically,
 24 Plaintiffs’ *Bivens* allegations, and their deficiencies, are as follows.

25 First Amendment rights to speech, assembly, and religion: Plaintiffs allege their
 26 First Amendment rights were violated by use of a “First Amendment Zone” for protest
 27

28 S. Ct. at 590.

1 activity and (nonspecific) religious bias against LDS. Doc. 11 ¶¶ 139A and 139G. There
2 is no *Bivens* remedy for alleged First Amendment violations.

3 Fourth and Fifth Amendment rights to due process: Plaintiffs allege these rights
4 were violated by wrongful arrest, prosecutorial misconduct and malicious prosecution. *Id.*
5 ¶ 139C. There is no *Bivens* remedy as pled for these violations.

6 The FAC also alleged Fifth Amendment substantive and procedural due process and
7 equal protection violations. *Id.* ¶ 139D. Plaintiffs have not stated with any specificity what
8 actions of the individual Defendants allegedly violated these proscriptions other than the
9 alleged placement of the Plaintiffs on a “Prohibited Persons List” which is discussed in
10 section VII of this motion. *See id.* ¶ 139E. Aside from the “Prohibited Persons List,” this
11 allegation is too vague for Defendants to make a response and should be dismissed for
12 failure to meet the general pleading standard of Rule 8.

13 The FAC also alleges Eighth Amendment freedom from cruel and unusual
14 punishment. Plaintiffs appear to allege this right was violated by the fact of their
15 incarceration and by alleged religious bias perpetrated against them in prison by unnamed
16 individuals. *Id.* ¶¶ 139C and 139G. The allegations supporting Plaintiffs’ Eighth
17 Amendment *Bivens* claim are so far removed from what must be alleged to establish a
18 violation of the Eighth Amendment this claim can be dealt with summarily. Suing over
19 the fact of incarceration is not an Eighth Amendment claim, it is a common law claim for
20 wrongful arrest or false imprisonment. The statute of limitations on such a claim runs from
21 the time of arraignment—March 3, 2016 in this case—and expired long before the original
22 complaint was filed here but the damages for continuing injury would theoretically be
23 preserved only by a malicious prosecution claim which is not an Eighth Amendment claim.
24 *Wallace v. Kato*, 549 U.S. 384, 389–90 (2007). Also, Plaintiffs cannot sue these
25 Defendants for acts perpetrated upon them by unnamed, unidentified prison guards.

26 Finally, the FAC may be interpreted to allege the violation of Plaintiffs’ Second
27 Amendment right to purchase and bear arms. Plaintiffs allege these rights were violated
28 when they were allegedly placed on a “Prohibited Persons List.” *Id.* ¶ 139B and 139E.

1 However, Plaintiffs do not specifically allege any of the individual Defendants were
 2 responsible for putting them on this list. In any case, there is no *Bivens* remedy for alleged
 3 Second Amendment violations.

4 **2. The Statute of Limitations Expired as to All *Bivens* Claims Made for**
 5 **Acts Prior to the Stand-off on April 12, 2014.**

6 As an initial, but conclusive, matter, Plaintiffs' *Bivens* claims present statute of
 7 limitations issues for the same reasons as Plaintiffs' Section 1983 claim. Like Section 1983
 8 actions, the statute of limitations for *Bivens* actions in Nevada is two years. *See Perez*, 869
 9 F.2d at 426 (Nevada statute of limitations is two years for Section 1983 claims); *Van Strum*
 10 *v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991) (statute of limitations for *Bivens* claims is the
 11 same as that for Section 1983 claims). All of the alleged constitutional violations based on
 12 actions during the "Cattle Impoundment Operation," and establishment of the "First
 13 Amendment Zone" took place more than two years before the original Complaint was filed;
 14 those claims are time barred.

15 **3. No *Bivens* Remedy Exists for the Constitutional Violations Alleged by**
 16 **Plaintiffs.**

17 Plaintiffs' *Bivens* claim is premised on violations of numerous alleged
 18 constitutional provisions (and thus more accurately described as multiple independent
 19 *Bivens* claims), the majority of which the Supreme Court has never recognized as a basis
 20 for an implied remedy under *Bivens*. Even where Plaintiffs' claims are premised on
 21 constitutional provisions that have previously formed the basis of *Bivens* liability, the
 22 circumstances here meaningfully differ from cases in which *Bivens* liability has been
 23 recognized. As such, most of Plaintiffs' claims present new contexts for *Bivens* liability.
 24 The Supreme Court has counseled hesitation before extending *Bivens* to new contexts, and
 25 none of the new contexts presented by Plaintiffs are appropriate for expansion.¹⁰

26
 27 ¹⁰ The First Amendment claims may challenge both prosecution of Plaintiffs, and
 28 their arrests and incarceration. However, because Plaintiffs were arrested and incarcerated
 pursuant to legal process (and not before), all three alleged acts collapse into a single tort
 for retaliatory prosecution. As the Supreme Court explained in *Wallace v. Kato*, 549 U.S.

1 In *Bivens*, the Court first recognized an implied cause of action for damages under
 2 the Fourth Amendment against federal officials “who violated the prohibition against
 3 unreasonable search and seizures.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017). It did
 4 so only after finding no “special factors counselling hesitation.” *Bivens*, 403 U.S. at 396.
 5 Despite multiple invitations over the years, the Court has only extended *Bivens* twice, the
 6 most recent occasion forty years ago. See *Davis v. Passman*, 442 U.S. 228 (1979) (a cause
 7 of action exists for gender discrimination pursuant to the equal protection component of
 8 the due process clause of the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (a
 9 cause of action exists for deliberate indifference to an inmate’s health care needs under
 10 the Eighth Amendment). “These three cases – *Bivens*, *Davis*, and *Carlson* – represent the
 11 only instances in which the Court has approved of an implied damages remedy under the
 12 Constitution itself.” *Abbasi*, 137 S. Ct. at 1855. The Court has indicated “it is possible
 13 that the analysis in the Court’s three *Bivens* cases might have been different if they were
 14 decided today.” *Id.* at 1856. That is because “expanding the *Bivens* remedy is now a
 15 ‘disfavored’ judicial activity.” *Abbasi*, 137 S. Ct. at 1857. Indeed, in the last forty years,
 16 the Court has “consistently refused to extend *Bivens* liability to any new context or new
 17 category of defendants.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); see also
 18 *Abbasi*, 137 S. Ct. at 1857.

19 In every *Bivens* case, “[t]he question is who should decide whether to provide for
 20 a damages remedy, Congress or the courts?” *Abbasi*, 137 S. Ct. at 1857 (internal
 21 quotations and citation omitted). “In most instances, the Court’s precedents now instruct,
 22 the Legislature is in the better position to consider if the public interest would be served
 23 by imposing a new substantive legal liability.” *Id.* at 1857 (internal quotations and citation
 24 omitted). “As a result, the Court has urged caution before extending *Bivens* remedies into
 25 any new context.” *Id.* (internal quotations and citation omitted). Whenever special factors
 26 _____
 27 384, 389-90 (2007) (citations omitted): “If there is a false arrest claim, damages for that
 28 claim cover the time of detention *up until issuance of process or arraignment*, but not more.
 From that point on, any damages recoverable must be based on a malicious prosecution
 claim and on the wrongful use of judicial process rather than detention itself.”

1 counsel *any hesitation*, “a *Bivens* remedy will not be available.” *Id.*

2 The Court has refined its special factors analysis into a two-part inquiry. Courts
3 must first determine whether the alleged *Bivens* claim presents a new context. “If the case
4 is different in a meaningful way from previous *Bivens* cases decided by *this* [United States
5 Supreme] *Court*, then the context is new.” *Id.* at 1859 (emphasis added). If the case
6 presents a new context, then “there is the question whether any alternative, existing process
7 for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain
8 from providing a new and freestanding remedy in damages.” *Wilkie v. Robbins*, 551 U.S.
9 537, 550 (2007); *see also Abbasi*, 137 S. Ct. at 1858 (an alternative process “alone may
10 limit the power of the Judiciary to infer a new *Bivens* cause of action”). In the absence of
11 an alternative process, “a *Bivens* remedy is a subject of judgment: ‘the federal courts must
12 make the kind of remedial determination that is appropriate for a common-law tribunal,
13 paying particular heed, however, to any special factors counselling hesitation before
14 authorizing a new kind of federal litigation.’” *Id.* (quoting *Bush*, 462 U.S. at 378)). “[I]f
15 there are sound reasons to think Congress might doubt the efficacy or necessity of a
16 damages remedy as part of the system for enforcing the law and correcting a wrong, the
17 courts must refrain from creating the remedy in order to respect the role of Congress in
18 determining the nature and extent of federal-court jurisdiction under Article III.” *Abbasi*,
19 137 S. Ct. at 1858.

20 **a. The FAC Raises New Contexts for *Bivens* Purposes.**

21 The Supreme Court has never recognized a *Bivens* claim for a First or Second
22 Amendment violation. *See Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012); *see e.g.*,
23 *Yorzinski v. Imbert*, 39 F. Supp. 3d 218, 223 (D. Conn. 2014) (“*Bivens* liability has not
24 been extended to violations of the Second Amendment.”) The Court has been quite clear:
25 “a case can present a new context for *Bivens* purposes if it implicates a different
26 constitutional right.” *Abbasi*, 137 S. Ct. at 1864. There is no question Plaintiffs’ *Bivens*
27 claims premised on alleged violations of the First and Second Amendments raise a new
28 context for *Bivens* liability. Thus, Plaintiffs’ allegations respecting alleged First

1 Amendment violations, whether having to do with a “First Amendment Zone” that
 2 restricted speech, or with religious freedom, and Second Amendment violations clearly
 3 raise new *Bivens* contexts.¹¹ See Doc. 11, ¶ 58, 86-91, 99, 112, 125, 139A, 156.

4 So too, the Fourth Amendment *Bivens* claim based on malicious prosecution raises
 5 a new context. Doc. 11, ¶ 137C. While *Bivens* itself involved a Fourth Amendment seizure
 6 *in the absence of judicial process, i.e.*, a “claim against FBI agents for handcuffing a man
 7 in his own home *without a warrant*,” *Abbasi*. at 1861 (emphasis added), the Second Claim
 8 challenges a different kind of seizure, one *pursuant to criminal process, i.e.*, a malicious
 9 prosecution claim. The Supreme Court has never recognized a *Bivens* claim for malicious
 10 prosecution. For *Bivens* purposes, “a modest extension is still an extension,” even if the
 11 new context has “significant parallels to one of the Court’s previous *Bivens* cases” and the
 12 differences are “perhaps small.” *Id.* at 1861, 1864, 1865; *see also id.* at 1858 (a context
 13 may be considered new “[e]ven though the right and the mechanism of injury [are] the
 14 same”). Thus, the context in *Abbasi* (a Fourth Amendment claim related to prison strip
 15 searches) was considered new because it was meaningfully different from the context in
 16 *Bivens* (a Fourth Amendment claim related to an in-home warrantless search and seizure).
 17 *Id.* at 1860; *see also Gonzalez v. Velez*, 864 F.3d 45, 53 & n.3 (1st Cir. 2017) (declining to
 18 extend *Bivens* to Fourth Amendment claim challenging search of plaintiff’s office after
 19 finding the context new).¹²

20
 21 ¹¹ Although the Ninth Circuit previously recognized a First Amendment *Bivens*
 22 claim, *see Gibson v. United States*, 781 F.2d 1334, 1342 (9th Cir. 1986), the new context
 23 inquiry is governed by *Supreme Court* precedent, not Circuit precedent. *See Buenrostro v.*
 24 *Fajardo*, No. 14-75, 2017 U.S. Dist. LEXIS 200002, *7 n.1 (E.D. Cal. Dec. 5, 2017)
 25 (“While the Ninth Circuit previously has authorized *Bivens* claims based on the First
 26 Amendment, [*Abbasi*] states that the proper test involves a consideration of *Bivens* cases
 27 decided by the Supreme Court, not by the Courts of Appeals. Ninth Circuit decisions are
 28 therefore not controlling.”). Indeed, the Ninth Circuit itself appears to recognize that in
 light of *Abbasi*, the issue of whether to extend the *Bivens* remedy to First Amendment
 retaliation claims is now an open one. *See Krug v. Pellicane*, No. 15-55178, 2017 U.S.
 App. LEXIS 23377, *1 (9th Cir. No. 20, 2017) (“Assuming without deciding that a *Bivens*
 remedy may be inferred for a First Amendment retaliation claim, *see Abbasi . . .*”).

¹² In *Brunoehler v. Tarwater*, 743 F. App’x 740, 743-44 & n.4 (9th Cir. 2018), a

Moreover, the Supreme Court in *Abbasi* indicated that a claim might present a new context (1) based on the rank of the officers involved; (2) if judicial precedent provides a less meaningful guide for official conduct; or (3) if additional special factors have not been previously considered. *Id.* The law concerning seizures pursuant to criminal process is not clear at this time. Indeed, the Supreme Court recently recognized that the Fourth Amendment governs unreasonable seizures pursuant to criminal process, but declined to determine the elements of any such claim. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 914-15, 920, 922 (2017); *see also id.* at 923 (“What is perhaps most remarkable about the Court’s approach is that it entirely ignores the question that we agreed to decide, *i.e.*, whether a claim of malicious prosecution may be brought under the Fourth Amendment.”) (Alito, J., dissenting). As for Plaintiffs’ *Bivens* claims premised on the Fourth Amendment, The differences between this case and *Bivens* alone indicate that Plaintiffs’ claim presents a new context. That the law on malicious prosecution is still in flux removes any lingering doubt. Consequently, the Supreme Court and Ninth Circuit have not yet considered the weighty special factors discussed below.¹³

panel majority, over a vigorous dissent, found that a Fourth Amendment “unlawful search and arrest” claim pursuant to a warrant and after a grand jury indictment did not present a new *Bivens* context. However, the plaintiff in that case appears to have raised only a false arrest claim, *not* malicious prosecution claim. In any event, *Brunoehler* is an unpublished, split decision, and with respect, the panel majority erred. As Judge Bea stated in dissent (743 F. App’x at 751):

The Majority concludes that Brunoehler’s arrest was not meaningfully different than *Bivens*’s. The Majority is incorrect, because *Bivens* was subjected to a warrantless arrest, *see Bivens*, 403 U.S. at 389-90, and Brunoehler was arrested pursuant to a warrant which followed a Grand Jury indictment. The difference is crucial: the officers whom Brunoehler now sues were operating under a different “legal mandate,” [*Abbasi*], 137 S. Ct. at 1860, than were the officers in *Bivens*, who executed a warrantless search without probable cause. As a result, per [*Abbasi*], the difference between our case and *Bivens* is “meaningful.” *Id.*

¹³ In *Wilkie*, the Court considered whether the remedies available through the criminal justice system counted as a special factor and strongly suggested that those avenues for relief might be sufficient reason not to create a new constitutional damages claim for malicious prosecution. 551 U.S. at 551-52 (“For each charge . . . Robbins had some procedure to defend and make good on his position. He took advantage of some opportunities, and let others pass; although he had mixed success, he had the means to be

1 For these reasons, all of the contexts alleged in Plaintiffs Second Claim—whether
 2 based on the First or Fourth Amendment¹⁴—are clearly new and a special factors analysis
 3 is required.

4 **b. *Special Factors Counsel Hesitation Against Extending Bivens to***
 5 ***The New Contexts Presented in Plaintiffs’ Bivens Claim.***

6 Here, in each new context Plaintiffs ask the court to recognize a *Bivens* remedy,
 7 special factors provide a convincing reason for the Judiciary to stay its hand in creating
 8 new implied remedies. Plaintiffs’ Second Claim arises out of the initiation of a criminal
 9 prosecution. Congress has provided several procedures to protect a criminal defendant’s
 10 constitutional rights, including the grand-jury requirement, probable-cause hearings,
 11 preliminary hearings, bond hearings, dismissal motions, jury trials, judgments of acquittal,
 12 direct appeals, habeas corpus, and even compensatory schemes. Congress did so after
 13 making critical policy choices about the best way to balance robust prosecutions against
 14 wrongful convictions. These ample protections “amoun[t] to a convincing reason for the
 15 Judicial Branch to refrain from providing a new and freestanding remedy in damages.”
 16 *Abbasi*, 137 S. Ct. at 1858 (citation omitted).

17 The starting point is the Federal Rules of Criminal Procedure. They are not just
 18 rules, but statutorily enacted by Congress and have the force of law. *See* 28 U.S.C. §§
 19 2073, 2074; *see also Deaver v. Seymour*, 822 F.2d 66, 70 n.9 (D.C. Cir. 1987) (“The
 20 Federal Rules of Criminal Procedure are a comprehensive set of rules of pleading,
 21 practice, and procedure for federal criminal prosecutions” that “have the force of law.”)
 22 And, they serve many important functions relevant to the claims at issue here. First, by
 23 heard.”). But because the plaintiff had challenged many government acts beyond the
 24 simple filing of charges, the Court declined to resolve that issue. *Id.* 551-54. It instead
 25 concluded that the proposed *Bivens* claim – alleging that at some point lawful conduct can
 26 turn into unconstitutional pressure in violation of due process (I find this clause unclear.
 27 Was the purported Bivens claim an abstract allegation that lawful process can, at some
 28 point, become unlawful?)– was unworkable as a proposed cause of action, and declined to
 imply a damages remedy. *Id.* at 555-61.

¹⁴ As noted briefly above Plaintiffs’ Second, Fifth and Eighth Amendments *Bivens*
 claims are not viable; they also present new contexts.

1 preserving the grand jury’s role and requiring an independent finding of probable cause,
 2 the Rules protect “against unfounded criminal prosecutions.” *United States v. Calandra*,
 3 414 U.S. 338, 343 (1974) (citation omitted); *see also United States v. Mechanik*, 475 U.S.
 4 66, 74 (1986); *United States v. Caruto*, 663 F.3d. 394, 398 (9th Cir. 2011); Fed. R. Crim.
 5 P. 6-7. Second, Congress ensured that the accused could challenge defects in the
 6 prosecution. For example, if the government does not adhere to the Criminal Rules, the
 7 accused may file a motion raising the violation as a defense, an objection, or a basis for
 8 relief. *See* Fed. R. Crim P. 12(b)(3). In this regard, Rule 12 specifically affords relief
 9 from “selective or vindictive prosecution,” “an error in the grand-jury proceeding or
 10 preliminary hearing,” and the use of evidence illegally obtained. *See generally* Fed. R.
 11 Crim. P. 12; *see also Mechanik*, 475 U.S. at 75 (“courts have consistently employed the
 12 remedy of dismissal of the indictment for deviations” from these rules) (O’Connor, J.,
 13 concurring) (citation omitted).¹⁵

14 The Rules also enshrine the constitutional right to trial by jury, another protection
 15 against wrongful prosecution. *See* Fed. R. Crim. P. 23-31; *United States v. Gaudin*, 515
 16 U.S. 506, 510–11 (1995) (jury trials are a necessary protection “against a spirit of
 17 oppression” and “great bulwark of [a citizen’s] civil and political liberties”) (citations
 18 omitted). Congress added procedures that allow for mistrial if the defendant was
 19 substantially prejudiced during trial, Fed. R. Crim. P. 23, and to include acquittal at the
 20 close of the government’s case or notwithstanding a guilty verdict, Fed. R. Crim. P. 26.3,
 21 additional post-verdict remedies, Fed. R. Crim. P. 32-39, and even a new trial if the
 22 “interest of justice so requires.” Fed. R. Crim. P. 33. Congress also added appellate
 23 remedies to challenge an unlawful detention. Fed. R. App. P. 4(b), Fed. R. App. P. 9.
 24 Congress formulated these procedures “after prolonged, careful and scholarly research.”
 25 *United States v. Virginia Erection Corp.*, 335 F.2d 868, 870 (4th Cir. 1964).

26
 27 ¹⁵ In felony cases initiated by complaint, the defendant is entitled to a timely
 28 preliminary hearing. *See* Fed. R. Crim. P. 3, 5.1; *Gerstein v. Pugh*, 420 U.S. 103, 114
 (1975). Absent a finding of probable cause, the “judge *must* dismiss the complaint and
 discharge the defendant.” Fed. R. Crim. P. 5.1(f) (emphasis added).

1 Congress also created an alternative existing process for challenging one's
 2 detention pursuant to process through the Bail Reform Act. *See* 18 U.S.C. §§ 3141-51.
 3 That statute carries a presumption *against* confinement and only permits detention in
 4 certain cases. *See* 18 U.S.C. § 3142(f)(1) & (2). Detention is imposed only after "a full-
 5 blown adversary hearing." *United States v. Salerno*, 481 U.S. 739, 750 (1987). The
 6 government must first "demonstrate probable cause to believe that the charged crime has
 7 been committed by the arrestee, but that is not enough." *Id.* It must then prove "by clear
 8 and convincing evidence that no conditions of release can reasonably assure the safety of
 9 the community or any person." *Id.* The accused has a right to counsel (which is provided
 10 if the accused is indigent) and may testify and present and cross-examine witnesses. *See*
 11 18 U.S.C. § 3142(f). There is also an opportunity for further review, including the
 12 opportunity to reopen a hearing at any time prior to trial if there is new evidence. *Id.* at
 13 § 3142(f)(2)(B). The Bail Reform Act, like the Criminal Rules, was the product of careful
 14 Congressional deliberation. *See* S. Rep. No. 98-225, at 18 (1983). The Supreme Court
 15 later upheld the Act as constitutional, noting its "extensive procedural safeguards,"
 16 Congress's "careful delineation," and the Government's many regulatory interests. *See*
 17 *Salerno*, 481 U.S. at 751-52.¹⁶

18 The Criminal Rules and the Bail Reform Act provide many avenues for challenging
 19 one's detention pursuant to criminal process. But Congress also decided that reasonable
 20

21 ¹⁶ Relatedly, the federal *habeas* statutes, 28 U.S.C. § 2241, *et seq.*, establish post-
 22 conviction procedures for challenging one's detention. For example, a prisoner may move
 23 to vacate his sentence based on a constitutional violation for which "the claimed error was
 24 a fundamental defect which inherently results in a complete miscarriage of justice."
 25 *Houser v. United States*, 508 F.2d 509, 512 (8th Cir. 1974) (internal quotations and citation
 26 omitted). This includes "[c]laims of a coerced confession, suppression of helpful evidence
 27 by the prosecutor, the Government's knowing use of perjured testimony, or the falsification
 28 of a transcript by a prosecutor." *Id.* at 517-18. *Abbasi* itself recognized habeas as a
 significant remedy upon emphasizing that "when alternative methods of relief are
 available, a *Bivens* remedy usually is not." 137 S. Ct. at 1837 (citation omitted). Even
 before *Abbasi*, the Ninth Circuit deemed habeas a significant remedy in deciding not to
 extend *Bivens* to the immigration context, even where the plaintiff alleged his detention
 was the result of fabricated evidence. *Mirmehdi v. United States*, 689 F.3d 975 (2012).

1 fees and expenses incurred by Plaintiffs with private counsel may be awarded in certain
 2 circumstances. For example, the Hyde Amendment, authorizes a federal court to award a
 3 defendant “a reasonable attorney’s fee and other litigation expenses” if he is the “prevailing
 4 party” and “the position of the United States was vexatious, frivolous, or in bad faith.”
 5 Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A,
 6 historical and statutory notes). Chairman Hyde explained that the bill was intended to
 7 remedy against prosecutorial misconduct, including the willful failure to disclose
 8 exculpatory evidence. *See* 143 Cong. Rec. H7786-04, H7791 (Sept. 24, 1997) (statement
 9 of Rep. Hyde). The bill sought to strike “the proper balance” of “deter[ing] unjustifiable
 10 governmental conduct” without “inhibit[ing] the aggressive prosecution of justifiable
 11 cases.” Statement of Honorable Henry J. Hyde before House Rules Committee on
 12 Amendment to H.R. 2267, 1997 WL 545756 (Sept. 5, 1997). Significantly, Congress
 13 deliberately chose *not* to authorize personal liability and instead “made federal prosecutors
 14 immune from the tort of malicious prosecution.” *Id.*¹⁷

15 In short, the criminal-justice system itself is an alternative, existing process through
 16 which Congress created numerous procedural safeguards for those wrongfully detained
 17 pursuant to process. Where the government acts maliciously and the defendant prevails,
 18 Congress provided for fees and costs. Where the convicted defendant proves his
 19 innocence, Congress provided for compensation. What Congress did not create is a
 20 personal damages remedy against individual Government employees.¹⁸ That was a
 21

22 ¹⁷ Congress also enacted the Unjust Conviction and Imprisonment statute, 28 U.S.C.
 23 § 2513, to provide compensation for those wrongfully convicted. *See Osborn v. United*
 24 *States*, 322 F.2d 835, 839 (5th Cir. 1963). A person seeking compensation must present to
 25 the Court of Federal Claims a “certificate of innocence” issued by the court that heard the
 26 facts leading to the wrongful conviction. 28 U.S.C. § 2513(b); *see also United States v.*
 27 *Graham*, 608 F.3d 164, 169 (4th Cir. 2010); *United States v. Racing Servs., Inc.*, 580 F.3d
 28 710 (8th Cir. 2009). The Court of Federal Claims may award up to \$50,000 per year of
 incarceration or \$100,000 per year in capital cases. *See* 28 U.S.C. § 2513(e). Thus,
 Congress has demonstrated both its ability and its willingness to legislate in this area where
 it wishes to create a remedy.

¹⁸ The FTCA does provide a civil remedy against the United States in some cases

1 deliberate judgment Congress made after balancing the need for robust prosecutions
 2 against the harm of wrongful convictions. This Court should defer to that judgment and
 3 decline to create an additional monetary remedy through judicial implication. That
 4 Plaintiffs might not have received all of the relief they wanted is of no moment. As the
 5 Supreme Court explained:

6 The question is not what remedy the court should provide for a wrong that
 7 would otherwise go unredressed. It is whether an elaborate remedial system
 8 that has been constructed step by step, with careful attention to conflicting
 9 policy considerations, should be augmented by the creation of a new judicial
 10 remedy for the constitutional violation at issue. That question obviously
 11 cannot be answered simply by noting that existing remedies do not provide
 12 complete relief for the plaintiff. The policy judgment should be informed by
 a thorough understanding of the existing regulatory structure and the
 respective costs and benefits that would result from the addition of another
 remedy.

13 *Bush*, 462 U.S. at 388.

14 Understanding this, the Eighth Circuit previously declined to extend *Bivens* to a
 15 wrongful-prosecution case arising out of “outrageous” police conduct. *Vennes v. An*
 16 *Unknown Number of Unidentified Agents*, 26 F.3d 1448 (1994). There, the plaintiff
 17 brought a *Bivens* suit alleging that officers violated his rights “by coercing and entrapping
 18 him into committing [various] crimes, thereby causing ‘an illegal indictment’ to issue.” *Id.*
 19 at 1449.¹⁹ The court declined to extend *Bivens*, finding that the plaintiff should have
 20 litigated his “allegations of outrageous coercive conduct in the most timely and relevant
 21 proceeding, his criminal trial,” which is the “process best suited to determining whether
 22 the agents in fact violated his due process rights.” *Id.* at 1452-53. The court warned that
 23 “[e]xpanding *Bivens*” to the criminal-justice context “would have a chilling effect on law
 24 enforcement officers and would flood the federal courts with constitutional damage claims
 25 by the many criminal defendants who leave the criminal process convinced that they have

26 _____
 27 as well.

28 ¹⁹ Plaintiffs here made the same basic argument that the Defendants’ master plan
 was to goad them into acting unreasonably.

1 been prosecuted and convicted unfairly.” *Id.* at 1452.

2 Finally, extending *Bivens* to the First Amendment claims is improper. The Supreme
3 Court has never extended *Bivens* to First Amendment claims, and post-*Abbasi*, the Ninth
4 Circuit and several district courts within this Circuit have refused to do so in various
5 contexts. *See Vega v. United States*, 881 F.3d 1146, 1153 (2018) (declining to extend
6 *Bivens* to First Amendment access to courts claim); *Thomas v. Matevousian*, No. 17-1592,
7 2018 U.S. Dist. LEXIS 179459, *16-17 (E.D. Cal. Oct. 18, 2018) (declining to extend
8 *Bivens* to First Amendment retaliation and access to courts claims); *Vanaman v. Unknown*
9 *Molinar*, No. 17-222, 2018 U.S. Dist. LEXIS 168971, *10-11 (D. Ariz. Sept. 28, 2018)
10 (declining to extend *Bivens* to First Amendment retaliation claim); *Boule v. Egbert*, No.
11 17-106, 2018 U.S. Dist. LEXIS 144583, *9-11 (W.D. Wash. Aug. 24, 2018) (same); *Jones*
12 *v. Hernandez*, No. 16-1986, 2017 U.S. Dist. LEXIS 186300, *27-32 (S.D. Cal. Nov. 9,
13 2017) (same). That reluctance is with good reason.

14 In *Wilkie*, the Supreme Court recognized as a special factor the threat that expanding
15 *Bivens* to a new context might “invite an onslaught of *Bivens* actions.” *Wilkie*, 551 U.S. at
16 562. That concern applies with particular force to First Amendment retaliation claims
17 where “an official’s state of mind is easy to allege and hard to disprove.” *Crawford-El v.*
18 *Britton*, 523 U.S. 574, 584-85 (1985). The Court has consistently resisted efforts to embroil
19 the Judiciary in lawsuits over the subjective motive of Executive officials in carrying out
20 official policy. *Ashcroft v. al-Kidd*, 563 U.S. 731, 737 (2011) (“[W]e have almost
21 uniformly rejected invitations to probe subjective intent.”); *Moss*, 134 S. Ct. at 2070
22 (declining to infer department-wide subjective intent based on allegations of misconduct
23 by a few). For these same reasons, retaliation-based claims are a particularly inappropriate
24 subject for non-statutory implied remedies. As *Abbasi* cautioned, when recognizing a new
25 remedy would open the floodgates, the unusual risk of “burden and demand” on officials
26 is heightened and hesitation against extending *Bivens* is warranted. 137 S. Ct. at 1860; *see*
27 *also id.* at 1858 (discussing “costs and consequences to the Government itself” in
28 considering new *Bivens* claim); *cf. Jones*, 2017 U.S. Dist. LEXIS 186300, at *29 (applying

1 rationale in declining to extend *Bivens* to a First Amendment claim alleging that officers
2 retaliated against a suspect for cursing).

3 Those same concerns apply to First Amendment retaliatory prosecution claims
4 given how easy it is to allege that a prosecution was based on some impermissible,
5 retaliatory motive. *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008)
6 (“There is almost always a weak inference of retaliation whenever a plaintiff and a
7 defendant have had previous negative interactions.”)

8 For all these reasons, this Court should decline the invitation to extend *Bivens* to the
9 new contexts presented by Plaintiffs’ Complaint and dismiss the Second Claim with
10 prejudice.

11 **4. Plaintiffs’ Conspiracy Claim Fails to State a Claim.**

12 Plaintiffs cited *Ting v. United States*, 927 F.2d 1504 (9th Cir. 1991) as the legal
13 basis for a *Bivens* conspiracy claim. Doc. 11, ¶ 160. The *Ting* court held:

14 To have an actionable *Bivens* conspiracy claim, *Ting* must establish (1) the
15 existence of an express or implied agreement among the defendant officers
16 to deprive him of his constitutional rights, and (2) an actual deprivation of
17 those rights resulting from that agreement. A conspiracy to deprive a
18 plaintiff of a civil rights action by lying or concealing evidence might
19 constitute such an actionable deprivation.

20 *Id.* at 1512. In *Ting*, the court found there was a factual dispute about the circumstances
21 of the police shooting but there was a lack of evidence of a conspiracy among the officers
22 so the conspiracy claim was dismissed. *Id.*

23 Clearly, there can be no *Bivens* conspiracy claim unless the underlying
24 Constitutional right is susceptible to a *Bivens* claim in the first place. As explained herein,
25 Plaintiffs have not alleged a valid *Bivens* claim against anyone, including the individual
26 Defendants in the first instance so there can be no valid *Bivens* conspiracy claim either.

27 Even if there was a valid *Bivens* claim, the conspiracy claim would fail. The alleged
28 conspiracy (i.e., the “express or implied agreement” among the defendants to deprive
Plaintiffs of their Constitutional rights) was described in the FAC as the Defendants’

1 “Cattle Impoundment Operation plan,” and their alleged “fabrication, destruction and
2 concealment scheme.” Doc. 11, ¶ 160. It appears from the general tenor of the FAC, that
3 the former “plan” was everything that happened before the Bunkerville standoff on April
4 12, 2014, and the latter “plan” was everything that happened afterwards. It seems
5 everything the Defendants did was part of a massive conspiracy according to the Plaintiffs.

6 First, the Cattle Impoundment plan did not violate any of these Plaintiffs’
7 Constitutional rights, at least none that are alleged in the FAC. According to the FAC, the
8 Cattle Impoundment plan was a design to “eliminate ranching operations” and “wage
9 economic and financial warfare against the ranchers by imposing restrictive grazing
10 permits” among other tactics. Doc. 11, ¶¶ 33, 57-59. Plaintiffs also alleged that Defendants
11 Love and Stover planned to goad the Bundy family into reacting or responding “physically”
12 to justify their own use of force. Doc. 11, ¶¶ 37, 57, 59. Plaintiffs have not alleged any
13 Constitutional rights that were violated by these alleged plans.

14 Likewise, Plaintiffs’ allegation that the “plan” included placement of snipers near
15 the Bundy ranch was not a Constitutional violation. Plaintiffs’ alleged Constitutional
16 violation with respect to the snipers is that the prosecution did not timely disclose evidence
17 about the presence of the snipers during the prosecution of Bundy, not that the snipers were
18 there in the first instance. See Doc. 11, ¶¶ 51, 52, 79, 80, 85, 98-100, 112. In the criminal
19 case, the argument over evidence about snipers was occasioned by Bundy’s desire to
20 combat prosecution charges, not that the snipers violated any of his rights. *Bundy* at 1032
21 (“Had the defendants been able to proffer a basis for genuinely believing that government
22 snipers surrounded the Bundy Ranch, they potentially could have negated the
23 government’s scienter theory. Thus, the defendants contend that the withheld evidence
24 was crucial to defending their case.”). Nor have Plaintiffs alleged any additional facts
25 related to the snipers that would suffice to state a constitutional violation.

26 Therefore, the “Cattle Impoundment Operation plan” cannot be the “express or
27 implied agreement” among the defendants to deprive Plaintiffs of their Constitutional
28 rights, because there was no actual deprivation of those rights resulting from the alleged

1 agreement. The only other alleged agreement was the alleged “fabrication, destruction and
 2 concealment scheme.” Doc. 11, ¶ 160. But this alleged scheme was part and parcel with
 3 the prosecution of the Tier 2 Plaintiffs. If there is no *Bivens* claim based on the prosecution
 4 of those four Plaintiffs, then there can be no *Bivens* conspiracy claim based on the same
 5 prosecution.

6 **VII. THE THIRD CLAIM (DECLARATORY RELIEF) FAILS TO STATE A**
 7 **CLAIM.**

8 For their Third Claim, Plaintiffs ask the Court to issue an order “restoring” their
 9 rights to purchase firearms, and ordering the Defendant United States to remove their
 10 names from a “Prohibited Persons List.” Doc. 11, ¶¶ 163-171. Since the rest of Plaintiffs’
 11 FAC is subject to dismissal for the reasons explained herein, Plaintiffs are not entitled to
 12 declaratory relief under 28 U.S.C. § 2202 based on the other claims. *See e.g., Bisson v.*
 13 *Bank of Am., N.A.*, 919 F. Supp. 2d 1130, 1139 (W.D. Wash. 2013) (A “court cannot grant
 14 declaratory relief in the absence of a substantive cause of action.... The Declaratory
 15 Judgment Act creates only a remedy, not a cause of action.”) Section 2202 authorizes a
 16 court to grant “[f]urther necessary or proper relief based on a declaratory judgment or
 17 decree . . . after reasonable notice and hearing, against any adverse party whose rights have
 18 been determined by such judgment.” *See, e.g., League to Save Lake Tahoe v. Tahoe Reg’l*
 19 *Planning Agency*, No. 3:09-CV-478-RCJ-RAM, 2013 WL 3463192, at *4 (D. Nev. July 9,
 20 2013) (holding that Plaintiff was not entitled to further relief under § 2202 upon concluding
 21 that the Ninth Circuit did not award Plaintiff declaratory relief).

22 The Ninth Circuit has observed that “§ 2202’s language is broad and does not seem
 23 to impose any stringent pleading requirements.” *Nautilus Ins. Co. v. Access Med., LLC*,
 24 780 F. App’x 457, 459 (9th Cir. 2019). However, it has also observed that a party’s
 25 entitlement to further relief is, in part, dependent on the application of relevant underlying
 26 substantive law. *Id.* (holding that, notwithstanding an award of declaratory judgment to
 27 insurer-plaintiff, plaintiff’s entitlement to relief under § 2202 “ultimately depends on
 28 whether [plaintiff] is entitled to reimbursement under Nevada law.”) Because, as explained

below, Plaintiffs here failed to plead a claim under federal law related to their No Fly and “Prohibited Persons List” allegations, their claim for further relief under § 2202 should also be dismissed.

The Third Claim itself fails to plead a cause of action for declaratory judgment. Plaintiffs generally alleged they were wrongly placed on, and remain on, a “Prohibited Persons List,” which allegedly has the effect of denying them the ability to purchase firearms in violation of their Constitutional rights. Doc. 11, ¶¶ 40, 139B, 139E, 166, 170. In addition, they alleged that the “Bundy Family” was wrongly placed on the No Fly List. Id. ¶¶ 40, 137. Plaintiffs did not allege any specific facts supporting either of these conclusory statements.

Specifically, Plaintiffs did not allege they have ever been prohibited from flying or traveling, or that their freedom of movement has otherwise been impeded. Plaintiffs have therefore failed to assert any factual basis to support their claim that they were placed on the No Fly List. *Cf. Jibreel v. Hock Seng Chin*, No. C 13-03470 LB, 2014 WL 12600278, at *7 (N.D. Cal. Apr. 17, 2014), *report and recommendation adopted*, No. 13-CV-03470-JST, 2014 WL 12617420 (N.D. Cal. May 5, 2014) (plaintiff did not allege “that he tried to fly internationally, and he does not allege any facts that would allow the court to find it likely he is realistically threatened with future injury.”) Indeed, Plaintiffs’ Complaint is so lacking in relevant factual details that it appears the No Fly List reference may be an overlooked remnant of Plaintiffs’ original Complaint.²⁰

Furthermore, the Court should require Plaintiffs to exhaust the administrative process pursuant to the Department of Homeland Security’s Traveler Redress Inquiry

²⁰ The original Complaint contained an “Eighth Claim for Relief” that explicitly claimed damages for placement on a “No-fly List” in addition to the claim for relief for inability to purchase firearms. Doc. 1, ¶¶ 242-251. In the FAC, the firearms claim was modified and retained but the No Fly List claim was dropped. Doc. 11, ¶¶ 163-171. The No Fly List was mentioned in the body of the original Complaint twice and those mentions may have inadvertently carried into the FAC despite the claim for relief on that basis being excised. *See* Doc. 1, ¶¶ 161, 162i.

1 Program, before permitting Plaintiffs to assert a No Fly claim.²¹ *See Shearson v. Holder*,
 2 725 F.3d 588, 594 (6th Cir. 2013) (“Shearson should be required to exhaust her
 3 administrative procedures by submitting a traveler inquiry form through the Redress
 4 Program before she can proceed with this case.”)

5 Neither did Plaintiffs allege facts that they have been prohibited from purchasing,
 6 possessing, or otherwise acquiring firearms, either because of failed background checks or
 7 for any other reason. To state a claim for relief, Plaintiffs must make some factual
 8 allegation that supports their theory that they have been placed on a “Prohibited Persons
 9 List,” and that they are harmed thereby. In the absence of any such allegation, Plaintiffs’
 10 allegations are conclusory—and insufficient. *Iqbal*, 556 U.S. at 678 (internal quotations
 11 and citation omitted) (“A pleading that offers labels and conclusions or a formulaic
 12 recitation of the elements of a cause of action will not do. Nor does a complaint suffice if
 13 it tenders naked assertion[s] devoid of further factual enhancement.”)

14 The FBI does not maintain a “Prohibited Persons List” that functions to deny
 15 Plaintiffs the ability to purchase or acquire firearms, as Plaintiffs allege. Plaintiffs’
 16 allegations about their inclusion on a “Prohibited Persons List,” appear to derive from an
 17 improper reading of a webpage maintained by the Bureau of Alcohol, Tobacco, Firearms
 18 and Explosives that summarizes the effect of 18 U.S.C. § 922(g). See
 19 <https://www.atf.gov/firearms/identify-prohibited-persons> (accessed September 2, 2020).
 20 Although 18 U.S.C. § 922(g) does make it unlawful for certain categories of persons to
 21 ship, transport, receive, or possess firearms or ammunition, the prohibition is statutory.
 22 And, while the FBI maintains a record of individuals who fall within § 922(g)’s
 23 proscriptions,²² as Plaintiffs’ pointed out, § 922(g)’s terms do not appear to apply to
 24

25 ²¹ This program serves as a “single point of contact for individuals who have
 26 inquiries or seek resolution regarding difficulties they experienced during their travel
 27 screening at transportation hubs—like airports—or crossing U.S. borders,” to include
 watch list issues. See <https://www.dhs.gov/dhs-trip> (accessed September 2, 2020).

28 ²²This record is referred to as the NICS Index. The NICS Index is defined in 28
 C.F.R. § 25.2 as “the database, to be managed by the FBI, containing information provided

1 Plaintiffs. *See* Doc. 11, ¶ 139E. Because Plaintiffs have alleged no facts supporting their
 2 conclusory theory that they are improperly being maintained on such a list, they did not
 3 properly plead under *Iqbal* and thus have failed to state a claim upon which relief can be
 4 granted.

5 Plaintiffs' request for relief under 42 U.S.C. § 1988 also fails. 42 U.S.C. § 1988
 6 authorizes a prevailing party to obtain a reasonable attorney's fee in connection with certain
 7 actions or proceedings to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985,
 8 and 1986 of title 42, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious
 9 Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and
 10 Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights
 11 Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34. The Third Claim of
 12 the FAC concerns none of these statutes. In any event, to obtain entitlement to fees, a
 13 plaintiff must prevail on the merits of a substantive issue. *Hanrahan v. Hampton*, 446 U.S.
 14 754, 758-59 (1980). Here, Plaintiffs have not even stated a claim for relief.

15 The Court should dismiss Plaintiffs' Third Claim for failure to state a claim upon
 16 which relief can be granted.

17 **VIII. THE FOURTH CLAIM (FTCA) WAS FILED PREMATURELY BECAUSE**
 18 **ADMINISTRATIVE REMEDIES WERE NOT EXHAUSTED.**

19 Plaintiffs' Fourth Claim was explicitly brought “[p]ursuant to 28 U.S.C. § 1346(b)”
 20 which is the Federal Tort Claims Act (FTCA). Doc. 11, ¶¶ 172-182. Because Plaintiffs
 21 failed to exhaust administrative remedies before filing their original Complaint, the FAC
 22 should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction
 23 without granting leave to amend.

24 The FTCA is a limited waiver of sovereign immunity, providing a remedy against
 25 the United States for the torts of its officers and employees while acting within the scope
 26 of their employment. *United States v. Orleans*, 425 U.S. 807, 813 (1976). Although the

27
 28 by Federal and state agencies about persons prohibited under Federal law from receiving
 or possessing a firearm.”

United States has waived its sovereign immunity through the FTCA, it can only be sued in accordance with the terms of that limited waiver. *Id.* at 814; *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). The FTCA provides that an “‘action shall not be instituted upon a claim against the United States for money damages’ unless the claimant has first exhausted administrative remedies.” *Vacek v. USPS*, 447 F.3d 1248, 1250 (9th Cir. 2006) (quoting 28 U.S.C. § 2675(a)). Thus, “[e]xhaustion of the claims procedures established under the Act is a prerequisite to district court jurisdiction.” *Johnson v. United States*, 704 F.2d 1431, 1442 (9th Cir. 1983). The Ninth Circuit has “repeatedly held that the exhaustion requirement is jurisdictional in nature and must be interpreted strictly.... We are not allowed to proceed in the absence of fulfillment of the conditions merely because dismissal would visit a harsh result upon the plaintiff.” *Vacek*, 447 F.3d at 1250 (citations omitted).

The FTCA provides, in pertinent part:

An action shall not be instituted upon a claim against the United States for money damages... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

28 U.S.C. § 2675(a). In short, “[t]he plaintiff is permitted to sue the United States only after the claim is denied or six months have elapsed without final disposition by the agency.” *Warren v. DOI BLM*, 724 F.2d 776, 778 (9th Cir. 1984). Here, instead of waiting until their administrative claim was denied or at least until the six-month period had expired, Plaintiffs filed this suit on February 6, 2020—a mere three days after they filed their administrative claims.²³ The failure to exhaust their administrative remedies before

²³ Three days according to the original Complaint filed on February 6, 2020, which alleged, “Plaintiffs submitted an Administrative Claim to the Federal Bureau of Investigation, the Bureau of Land Management and to the United States Department of Justice on or about February 3, 2020.” Doc. 1, ¶ 228. Apparently recognizing the folly of this paragraph, the alleged date of service of the Administrative Claim was excised from the FAC, which merely alleged a claim was served. Doc. 11, ¶ 182. Defendant reserves the right to argue in a future motion, should it be necessary, that the Administrative Claim

1 filing their FTCA claims deprives this Court of jurisdiction over them. *See Johnson*, 704
2 F.2d at 1442.

3 Although the six-month period expired on August 3, 2020,²⁴ filing suit prior to the
4 expiration of the six-months and then simply waiting until that date arrives does not save
5 the FTCA claims from dismissal. In *McNeil v. United States*, 508 U.S. 106, 107 (1993),
6 the Court addressed “whether such an action may be maintained when the claimant failed
7 to exhaust his administrative remedies prior to filing suit, but did so before substantial
8 progress was made in the litigation.” *Id.* In other words, *McNeil* addressed the precise
9 issue raised here: what to do when an FTCA lawsuit “[i]s filed too early.” *Id.* at 111.

10 The Court’s answer was unequivocal: by filing suit in federal court before
11 exhausting his administrative remedies, “[the] petitioner failed to heed [the FTCA’s] clear
12 statutory command, [and] the District Court properly dismissed his suit.” *Id.* at 113. The
13 Court recognized the potential harshness of this rule, but noted:

14 Every premature filing of an action under the FTCA imposes some burden
15 on the judicial system and on the Department of Justice which must assume
16 the defense of such actions. Although the burden may be slight in an
17 individual case, the statute governs the processing of a vast multitude of
18 claims. The interest in orderly administration of this body of litigation is best
19 served by adherence to the straightforward statutory command.

20 *Id.* at 112. The Court further explained, “in the long run, experience teaches that strict
21 adherence to the procedural requirements specified by the legislature is the best guarantee
22 of evenhanded administration of the law.” *Id.* at 113 (quoting *Mohasco Corp. v. Silver*,
447 U.S. 807, 826, (1980)).

23 *McNeil* requires dismissal here. *See also Jerves v. United States*, 966 F.2d 517, 518-
24 20 (9th Cir. 1992) (dismissing FTCA claim prematurely filed five months after plaintiff
25 filed administrative claim); *Pesnell v. United States*, 64 F. App’x 73, 74 (9th Cir. 2003)

26 _____
27 was not timely served on the federal agencies.

28 ²⁴ Again, assuming the original Complaint was accurate that the Administrative
Claims were filed on February 3, 2020. Doc. 1, ¶ 228.

1 (dismissing FTCA claim prematurely filed two months after plaintiff filed administrative
2 claim); *Wiens v. U.S. Veterans Hosp.*, No. 17-1672, 2017 U.S. Dist. LEXIS 186386, *4-5
3 (E.D. Cal. Nov. 7, 2017) (dismissing FTCA claim prematurely filed four months after
4 plaintiff filed administrative claim); *Watson v. United States*, No. 16- 608, 2017 U.S. Dist.
5 LEXIS 104853, *10-11 (D. Nev. July 6, 2017) (dismissing FTCA claim prematurely filed
6 18 days after plaintiff filed administrative claim); *see also Plyler v. United States*, 900 F.2d
7 41, 42 (4th Cir. 1990) (“Since the district court had no jurisdiction at the time the action
8 was filed, it could not obtain jurisdiction by simply not acting on the motion to dismiss
9 until the requisite [six month] period had expired.”).

10 Finally, amendment cannot cure this defect. As one court explained:

11 If the claimant is permitted to bring suit prematurely and simply amend his
12 complaint after denial of the administrative claim, the exhaustion
13 requirement would be rendered meaningless. Because § 2675(a) of the
14 FTCA requires that an administrative claim be finalized at the time the
15 complaint is filed, plaintiff’s complaint cannot be cured through amendment,
16 but instead, plaintiff must file a new suit. This Court lacks subject matter
jurisdiction over the present action, which was commenced before the
exhaustion requirement under § 2675(a) was satisfied.

17 *Sparrow v. USPS*, 825 F. Supp. 252, 255 (E.D. Cal. 1993). This Court should follow the
18 reasoning of Sparrow, particularly in light of the repeated admonitions by the Ninth Circuit
19 that “the exhaustion requirement is jurisdictional in nature and must be interpreted strictly.”
20 *Vacek*, 447 F.3d at 1250. This Court should dismiss the Fourth Claim (FTCA) for lack of
21 subject matter jurisdiction without granting leave to amend.

1 **IX. CONCLUSION**

2 For the reasons stated herein, Plaintiffs' FAC against Defendants United States of
3 America, Nadia Ahmed, Steven Myhre, Daniel Bogden, Mark Brunk, Rand Stover, and
4 Joel Willis should be dismissed.

5 RESPECTFULLY SUBMITTED this 22nd day of September, 2020.

6 WILLIAM P. BARR
7 United States Attorney General

8 *s/ Brock Heathcotte*
9 BROCK HEATHCOTTE
10 Special Assistant United States Attorney, Acting
11 Under Authority Conferred by 28 U.S.C. § 515
12 *Attorneys for Defendants*
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X. CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

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